88-654

No. 88-

Supreme Court, U.S.
FILED
OCT 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DR. ANJALI JOSHI,

Petitioner,

v.

FLORIDA STATE UNIVERSITY HEALTH CENTER, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JERRY G. TRAYNHAM
Counsel of Record
PATTERSON AND TRAYNHAM
1215 Thomasville Road
Post Office Box 4289
Tallahassee, FL 32315
(904) 224-9181
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Whether "substantially equivalent" employment, within the meaning of this Court's *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982) decision, which a Title VII plaintiff must seek to mitigate loss of earnings, should be broadly construed to include jobs which require a plaintiff to leave her family and move to another city, or jobs with substantially more onerous working conditions or which require substantial additional training.

II. Whether a Title VII plaintiff who does not seek jobs which impose substantial hardships, but which are within an unfairly broad construction of "substantially equivalent" employment, *and* who has her back pay award reduced by amounts earnable from such employment, is entitled as make whole relief to other employment benefits which could not have been obtained in alternative employment, such as retirement credit, retroactive seniority, sick leave and the like.

LIST OF PARTIES

The parties to this proceedings are Dr. Anjali A. Joshi, Petitioner; and Bernard Sliger in his capacity as President of Florida State University, Dr. Homer Ooten in his capacity as Director of Business Affairs, Dr. Robert Hunter in his capacity as Former Director of Florida State University Health Center, and Dr. Phillip Rond, as Director of Florida State Health Center, Respondents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	5
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION OF THE COURT BELOW, IN BROADLY CONSTRUING THIS COURT'S DECISION IN *FORD MOTOR CO v. EEOC*, NECESSARILY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS WITH REGARD TO THE PROPER STANDARD TO BE USED IN DEFINING "SUBSTANTIALLY EQUIVALENT" EMPLOYMENT AND THE STANDARD FOR REASONABLE DILIGENCE IN MITIGATING DAMAGES RESULTING FROM EMPLOYMENT DISCRIMINATION	8
II. EVEN WHERE AN AWARD OF BACK PAY IS REDUCED BY AMOUNTS EARNABLE IN EQUIVALENT EMPLOYMENT, A DISTRICT COURT SHOULD AWARD THE DISCRIMINATION VICTIM EQUITABLE "MAKE WHOLE" RELIEF THAT COULD NOT HAVE BEEN OBTAINED IN ALTERNATIVE EMPLOYMENT, SUCH AS RETROACTIVE SENIORITY, RETIREMENT CREDIT, AND A SALARY WHICH REFLECTS EMPLOYMENT FROM THE DATE OF THE DISCRIMINATORY EVENT	12

TABLE OF CONTENTS—Continued

Page

CONCLUSION 15

APPENDIX 1a

TABLE OF AUTHORITIES

SUPREME COURT CASES — Page

Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) 8, 10, 12

Ford Motor Company v. E.E.O.C., 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982) 4, 5, 9

Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) 12, 13, 14

Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) 13

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) 3

OTHER FEDERAL CASES

Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 13

E.E.O.C. v. Exxon Shipping Co., 745 F.2d 967 (5th Cir. 1984) 9

Florence Printing Co. v. N.L.R.B., 376 F.2d 216 (4th Cir. 1967) 10, 11

Gamble v. Birmingham So. Railroad Co., 514 F.2d 678 (5th Cir. 1975) 14

Hegler v. Board of Education of Bearden School Dist., Bearden, Ark., 447 F.2d 1078 (8th Cir. 1971) 11

Joshi v. Florida State University, et al., 486 F. Supp. 86 (N.D. Fla. 1980) 3

Joshi v. Florida State University, et al., 646 F.2d 981 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 972 (1981) 3

Joshi v. Florida State University, et al., 763 F.2d 1227 (11th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 347 (1985) 3

Marks v. Prattco Inc., 633 F.2d 1122 (5th Cir. Unit A 1981) 9

Moseley v. Goodyear Tire & Rubber Co., 612 F.2d 187 (5th Cir. 1980) 14

Nord v. U.S. Steel Corp., 758 F.2d 1402 (11th Cir. 1985) 8, 9

TABLE OF AUTHORITIES—Continued

Page

N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972) 10, 11

Rasimas v. Michigan Dept. of Mental Health, 714 F.2d 614 (6th Cir. 1985) 9

Spagnuolo v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983) 11

STATUTORY PROVISION INVOLVED

42 U.S.C. Section 2000(e)-5(g) 9, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

DR. ANJALI JOSHI,

Petitioner,

v.

FLORIDA STATE UNIVERSITY HEALTH CENTER, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The unreported opinion of the Court of Appeals for the Eleventh Circuit entered on April 18, 1988, is reproduced in the Appendix at p. 55a. The order denying rehearing entered on June 20, 1988 is reproduced in the Appendix at p. 66a. The Final Order of the District Court for the Northern District of Florida, entered on November 6, 1986 is set out in the Appendix at p. [illegible]a. The opinion of the United States Court of Appeals for the Eleventh Circuit, entered on June 25, 1985 is reported at 763 F.2d 1227 and reproduced in the Appendix at p. 21a. The opinion of the Fifth Circuit Court of Appeals is reported at 646 F.2d 981 (5th Cir. Unit B, 1981), and is reproduced in the Appendix at p. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1988. A timely petition for rehearing was filed, and the order of the Court of Appeals denying the petition for rehearing was entered on June 20, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1) and 2101(c).

STATUTORY PROVISION INVOLVED

42 U.S.C. Section 2000(e)-5(g):

> (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders
>
> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission, interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. . . .

STATEMENT OF THE CASE

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000(e), *et seq.* In June 1978, Petitioner, Dr. Anjali A. Joshi, sued Respondent, the Florida State University, for discrimination in failing to hire her as a University clinic physician.

The District Judge for the Northern District of Florida, held the evidence established Dr. Joshi's announcement of her entry into the private practice of medicine in the local newspaper removed her as an applicant for employment with the Respondent, and, therefore, she did not establish a *prima facie* case of discrimination. *Joshi v. Florida State University, et al.*, 486 F.Supp. 86 (N.D. Fla. 1980). Petitioner appealed.

The United States Court of Appeals for the Fifth Circuit found the District Judge clearly erroneous and reversed, in part, holding Petitioner was an applicant and had proven a *prima facie* case of discrimination, which required the Respondent University to articulate a legitimate, nondiscriminatory reason for failing to hire her. *Joshi v. Forida State et al.*, 646 F.2d 981, 990 (5th Cir. Unit B, 1981). On remand, the Honorable Maurice M. Paul, held Petitioner did not overcome the University's articulation that, because of her entry into private medical practice, she was not selected because the University did not believe she was an active applicant for the position. Petitioner appealed again.

The Eleventh Circuit found the District Judge clearly erroneous, and held, the University had failed to meet its burden of articulation under *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). *Joshi v. Florida State University et al.*, 763 F.2d 1227, 1236 (11th Cir. 1985). The Court reversed the judgment and remanded for entry of "appropriate relief including hiring and back pay." *Id.* at 1237.

On remand, Judge Paul determined that, as a result of the University's discrimination, Petitioner had lost wages in the amount of $109,510.57.[1] However, Judge Paul rejected Petitioner's private medical practice as a

[1] The Court reached the calculation by deducting actual earnings from lost wages. *See*, Appendix at p. 41a.

reasonable effort to mitigate her damages, and found her testimony concerning her other efforts was not credible. Relying on *Ford v. EEOC*, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982), the District Court held Respondent to the burden of proving there were comparable jobs available Petitioner did not seek. The Court construed "substantially equivalent" employment broadly, holding Petitioner should have sought any of a series of five positions, with respect to which the Defendants were able to produce *no* evidence of qualifications or employment conditions. Two positions were in another state, in which she was not licensed, two were local emergency room physician positions for which she is not then qualified, and the fifth position required her to move to another county.[2]

Judge Paul concluded that had Petitioner exercised reasonable diligence by seeking such jobs, she would have secured comparable employment within one year of the discrimination. Accordingly, her award of back pay was reduced to $12,078.93, to which prejudgment interest was added.

In addition, the District Court awarded a naked hiring preference. The hiring preference did not include any attempt to place Dr. Joshi in the position she would have occupied had the discrimination not occurred, such as a salary equivalent to persons who were hired during the discriminatory period, retroactive seniority against lay-offs, retirement credits and other "make whole" relief.

---

[2] The Respondents' expert witness identified five positions during the relevant period that Petitioner did not seek. Two were for emergency room physicians in Georgia hospitals. Two others were for emergency room physicians in local hospitals. Petitioner is a family practitioner, not trained in emergency medicine. The fifth position required residence in another county. Petitioner lived with her husband and family in Leon County, Florida, in a home they had recently built.

Following judgment, Petitioner served a Rule 59 (e) motion to alter or amend the judgment, raising the absence of "make whole" relief in the judgment, and the failure of the Respondent to meet its burden under *Ford*. On February 2, 1987 the trial court denied the motion without comment. Petitioner appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit, in an unpublished opinion, held Petitioner, despite her private medical practice and other employment during the relevant period, did not satisfy her obligation to mitigate damages. The Eleventh Circuit expressly adopted the District Court's broad construction of this Court's *Ford* decision. *See*, Appendix at 57a. After approving the reduction from back pay of amounts earnable from what the Court concluded was "substantially equivalent" employment, the Circuit Court held it was within the District Court's discretion to withhold other equitable "make whole" relief. A petition for rehearing was denied on June 20, 1988. This petition followed.

STATEMENT OF THE FACTS

Dr. Anjali Joshi is a female physician, born and educated in India. On August 22, 1974 she obtained her Florida medical license. In August 1975, she informed Respondents that she was licensed and willing to accept night and weekend duty [3] which she could not previously accept because of her need to care for her two young children. At this time, Petitioner made formal application for employment as a physician at Respondent Health Clinic. She was subsequently interviewed, and ultimately denied employment.

Both the Fifth Circuit and the Eleventh Circuit Courts of Appeals determined Petitioner was discriminatorily de-

---

[3] Weekend and night duty were mandatory requirements for employment at the clinic.

nied positions which were offered to several doctors in 1976, some of whom ultimately accepted employment at the clinic.[4]

From the date Petitioner applied with Respondent University Health Center in mid August 1975, until February 1982, Petitioner maintained a private practice of medicine in Tallahassee, Florida. She practiced in an office she shared with another doctor. Because her practice did not grow quickly enough to occupy her on full time basis, she supplemented her private practice by doing both part time work and "fee-for-service" work for other clinics and government agencies. Between her private office practice and the other work she performed, Petitioner *engaged* in the practice of medicine on a full time basis,[5] though she continued to search for salaried positions.[6]

In 1978, the frequency with which agencies (for which Petitioner was performing work) requested work decreased significantly. Petitioner's workload from many of the agencies was not reliable and constituted sporadic, unpredictable employment which in many ways affected

---

[4] *See, Joshi v. Florida State University Health Center, et al.*, 646 F.2d 981 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 972 (1981); *Joshi v. Florida State University*, 763 F.2d 1227 (11th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 347 (1985).

[5] For example, Petitioner performed part time work for the Wakulla Manor Nursing Home from June 1976 to June 1977. From July 1977 to July 1979, Petitioner worked two days per week at the Tallahassee Federal Correctional Institution. From November 1977 to July 1981, Petitioner performed "fee-for-service" work for clients at the Leon County Health Department.

[6] Petitioner testified she worked at her medical practice at least 40 hours *every* week. Though the District Judge did not make a specific finding on this testimony, he found other of her testimony not credible. He also implied he did not consider the private practice "full time" employment, because it was not financially successful.

the success of her private office pracitce.[7] In addition, referrals from agencies began to slow down after 1979. Petitioner was required to find new opportunities to perform her services.

During the period prior to 1982. Petitioner explored the possibility of alternative employment. She continued to look for full-time salaried positions similar to the one she was discriminatorily denied at Florida State University. She registered and filed an application with the State of Florida, Division of Personnel, Department of Administration, for positions as a physician in 1975.[8] Additionally, she renewed her application yearly, as required, thus renewing her interest and desire to be employed in a full-time salaried capacity. Further, Petitioner contacted several agencies of the Florida Department of Health and Rehabilitative Service during 1976. Such agencies included the Medicaid section and the Office of Disability Determinations. Petitioner also sent her application to the H.R.S. Department of Personnel. In August 1977 she contacted the Department of Health and Rehabilitation Service Sunland Center, but to no avail. In November 1978, Petitioner contacted the Florida Department of Health and Rehabilitative Services, Medicaid Utilization Division and Child Division. The same offices were again contacted in 1980 and 1981.

In November 1981, Petitioner interviewed with the Florida A & M Health Center. She also contacted several private companies including Robin Meyers in April 1980, Capital Medical Plan in May 1981 and a women's clinic in June 1981.

---

[7] Because this situation demanded Petitioner's services on short notice, hours during which she sometimes scheduled private patients, her private practice suffered considerably.

[8] Surprisingly, and despite proof of such applications, the Northern District did not find Petitioner's efforts credible, but it is unclear which application or efforts were not credible.

Petitioner continued to work for the HRS Leon County Health Department from November 1977 to July 1981, because she was informed that a full time salaried position would be opened, which she hoped to obtain as a result of her specially attentive attitude toward their needs. The full-time position was given to another physician, however.

The major fringe benefits associated with the employment Petitioner lost as a result of Respondents' actions were: Retirement benefits under the State retirement system, matching FICA taxes under the Social Security system, a variety of leave and insurance benefits, and job seniority, which affects salary, retention rights, and the accrual of leave time.

In September 1981, Petitioner was finally hired to perform part time medical services for the HRS Office of Disability Determinations. In February 1982 she began full-time salaried employment with the Office of Disability Determinations.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW, IN BROADLY CONSTRUING THIS COURT'S DECISION IN *FORD MOTOR CO. v. EEOC*, NECESSARILY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS WITH REGARD TO THE PROPER STANDARD TO BE USED IN REFINING "SUBSTANTIALLY EQUIVALENT" EMPLOYMENT AND THE STANDARD FOR REASONABLE DILIGENCE IN MITIGATING DAMAGES RESULTING FROM EMPLOYMENT DISCRIMINATION

In awarding damages in a Title VII case, the District Court must seek to place the injured party in the position he or she would have occupied absent the discriminatory actions. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Nord v. US Steel Corp.*, 758 F.2d 1402, 1470 (11th Cir. 1985).

The affirmative duty to mitigate damages after employment discrimination has occurred, is statutorily imposed by Section 706(g) of Title VII. *See*, 42 U.S.C. Section 2000(e)-5(g). Section 706(g) requires that "'interim earnings', or amounts earnable with reasonable diligence, by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable". *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 623 (6th Cir. 1985) (quoting 42 U.S.C. Section 2000(e)-5(g)). This duty to mitigate damages was recognized by this Court in *Ford*, *supra*, and was summarized as follows:

> This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied.

Ford, 458 U.S. at 231-32.

Under the accepted order of proof, once a Title VII plaintiff has established a *prima facie* case of discrimination, the burden of producing further evidence to show the plaintiff's lack of reasonable diligence in securing comparable employment falls on the discriminating employer. *See, Nord*, 788 F.2d at 1470; *Marks v. Prattco Inc.*, 633 F.2d 1122 (5th Cir. Unit A 1981). This burden requires the discriminating employer to establish that there were "substantially equivalent" positions which were available to the victim and that the victim of discrimination failed to use reasonable care and diligence in seeking those positions. *EEOC v. Exxon Shipping Co.*, 755 F.2d 967 (5th Cir. 1984); *Rasimas*, 714 F.2d at 624. Nevertheless, back pay should be denied only for reasons which, if applied generally, would not frustrate the purpose of eradicating discrimination throughout the

economy and making the person "whole" for injuries suffered. *Albemarle*, 422 U.S. at 421.

In accepting the Northern District's finding that equivalent positions were available, the Eleventh Circuit's holding directly conflicts with other circuits in defining "substantially equivalent" positions.

In this case, the Eleventh Circuit held that substantially equivalent positions to the University physician position sought by Petitioner were available in the emergency rooms of Tallahassee, Quincy and surrounding towns in the State of Georgia. Additionally, the court held that failure to attempt to secure such employment was due to Petitioner's narrow definition of "substantially equivalent" employment.

The Eleventh Circuit was unconcerned with whether the Petitioner would have to obtain licensure in another state[9], additional and perhaps extended training[10], or dislodge her husband from his employment and move her family to another geographic area.[11] This holding conflicts with decisions of the D.C., Fourth, and Eighth Circuits.

The Fourth Circuit has held that a Title VII claimant may refuse employment which is dangerous, distasteful or essentially different from that for which he sought employment. *Florence Printing Co. v. NLRB*, 376 F.2d 216 (4th Cir. 1967).

In *NLRB v. Madison Courier Inc.*, 472 F.2d 1307 (D.C. Cir. 1972), the court held that claimant had not failed in attempting to secure "suitable" employment by

---

[9] Petitioner was licensed only in Florida, and thus was not qualified for employment in Georgia hospitals without further licensure.

[10] Petitioner is a family practitioner. She is not trained in emergency medicine or traumatic surgery.

[11] One of the positions identified by the Respondent's expert witness at trial required residence in another county.

rejecting a position located over fifty miles from her place of residence, due to the excessive commute such jobs would entail. *Madison Courier Inc.* 472 F.2d at 1314. Similarly, the Fourth Circuit recognized that a Title VII claimant may refuse to accept employment which is located at a distance from her home. *Florence Printing Co.*, 376 F.2d at 221.

In *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114 (4th Cir. 1983), the Court held that a district court must fashion an order "that will grant the most complete relief possible toward putting the victim of discrimination back into a position he would have been but for the discrimination". *Id.* at 118. More to the point, the Court in *Spagnuolo* held that requiring a discrimination victim to accept employment at an unreasonable distance would put the victim in an objectively worse position than he was in prior to the discrimination. *See, id.*

Furthermore, the Court of Appeal for the Eight Circuit, consistent with the decisions of the D.C. Circuit and the Fourth Circuit, concluded it is reasonable for a claimant to "refuse to abandon her community and move to another state in order to reduce damages caused by unlawful acts". *See, Hegler v. Board of Education of Bearden Sch. Dist. Bearden Ark.*, 447 F.2d 1078 (8th Cir. 1971).

This case illustrates the anomalous impact the Eleventh Circuit's broad construction of comparable employment can have on a victim of discrimination. While the positions identified by the Respondents' expert would not require Petitioner to enter another line of work, accept a demotion or accept a demeaning position, the emergency room and other jobs would have required her to assume a substantially different position than the one for which she was trained and qualified. She would have had to gain licensure in another state, undergo substantial additional and perhaps extended training, or move her family to another geographic area. This result was re-

jected by the decisions of the D.C., Fourth, and Eighth Circuits.

By faulting Petitioner for not seeking employment which was either substantially different in character, and/or located at an unreasonable distance from her home, Petitioner was held to an unacceptably strict standard. The Court should clarify the legal standard announced in *Ford*, by adopting the view advanced by Petitioner.

II. EVEN WHERE AN AWARD OF BACK PAY IS REDUCED BY AMOUNTS EARNABLE IN EQUIVALENT EMPLOYMENT, A DISTRICT COURT SHOULD AWARD THE DISCRIMINATION VICTIM EQUITABLE "MAKE WHOLE" RELIEF THAT COULD NOT HAVE BEEN OBTAINED IN ALTERNATIVE EMPLOYMENT, SUCH AS RETROACTIVE SENIORITY, RETIREMENT CREDIT, AND A SALARY WHICH REFLECTS EMPLOYMENT FROM THE DATE OF THE DISCRIMINATORY EVENT

The Eleventh Circuit held, in this case, that when a district court reduces back pay "by amounts earnable with reasonable diligence", it also has discretion to withhold other make whole relief which could not have been obtained in alternative employment. This holding conflicts in a fundamentally important way with this Court's prior decisions.

This Court, in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), recognized the intent of Congress in providing a victim of employment discrimination an equitable remedy to neutralize the effects of discrimination. The Court, in line with the Congressional plan, held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 763. *See also, Albemarle Paper Co., supra.* In line with the Congressional objective of

making persons "whole", Title VII charges courts the duty to exercise discretionary equitable power to "fashion the most complete relief possible. 424 U.S. at 764. This relief is aimed at restoring the victim to the position that would have been occupied were it not for the unlawful discrimination. *See, id.*

In the present case, the Court below recognized Petitioner was discriminatorily denied employment ten years prior to judgment, and therefore awarded her a preferential right to be hired in the next available physician position, but without seniority, or even a salary which is reflective of the position she would have occupied but for the discrimination. In essence, the lower court afforded Petitioner the "right" to take a substantial salary cut, and assume the position she should have never been denied. The relief offered is no relief.

In view of *Franks,* an order requiring Respondents to grant Petitioner a hiring preference, without more, would perpetuate the effect of the discrimination and would conflict with the legislative intent behind Title VII. This result bypasses the court's duty to fashion relief that eradicates both past and future discrimination. *See, Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965). Even where the Court diminishes the award of back pay to Petitioner for the period prior to employment at Respondents' clinic, a refusal to award accrued seniority does not make the victim whole for the period subsequent to the hiring. *See, Bowe v. Colgate Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969), in which the court held Title VII relief should make the victim whole and end future discriminatory impact.

Section 706(g) of Title VII, 42 U.S.C. Section 2000(e)-5(g), authorizes appropriate judicial relief from unlawful employment practices. This Court has held that adequate relief may well be denied "in the ab-

sence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application". *Franks*, 747 U.S. at 765-66. Had Petitioner been hired at the time of her application, she would have now been entitled to certain benefits, options and safeguards including promotions, salary increases based on reviews of performance, pension benefits, prerogative in scheduling vacation, transfer, preferential position in the order of layoff and other accrued benefits which would not have been obtained elsewhere. In determining proper remedy for a victim of discrimination, courts have made it clear that relief is to be granted within the framework of the "rightful place" theory. *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678, 683 (5th Cir. 1975); *See also, Moseley v. Goodyear Tire & Rubber Co.*, 612 F.2d 187, 191 (5th Cir. 1980). Persons injured by violations of Title VII, should be restored to the economic position they would have occupied had no discrimination occurred. *See, Gamble*, 514 F.2d at 683. Petitioner, who was discriminatorily denied employment over ten years ago must be awarded the seniority accrued over that period. To allow otherwise, would allow Respondents to profit from their own illegal conduct. Rightful place seniority has been recognized as an essential part of an equitable remedy for discrimination and should be awarded if a victim is to be restored to a rightful economic position.

The District Court, in denying the motion to amend the judgment in a manner consistent with the "rightful place" theory, is in effect, condemning Petitioner to a seniority position subordinate to others who passed her, using illegal discrimination as a vehicle. *See*, 424 U.S. at 768. Petitioner will be forever suffering the effects of the discrimination, and, in turn, Respondents will have the benefit of a qualified physician at an unfairly advantageous rate of pay. In essence, the relief awarded

by the lower court, rewards Respondents for their discriminatory practice and denies Petitioner her rightful position with regard to all accrued benefits, a result inconsistent with the remedial purposes of Title VII.

CONCLUSION

For the reasons stated above, Petitioner requests that this Court grant the writ.

Respectfully submitted,

JERRY G. TRAYNHAM
Counsel of Record
PATTERSON AND TRAYNHAM
1215 Thomasville Road
Post Office Box 4289
Tallahassee, FL 32315
(904) 224-9181
Attorney for Petitioner

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the the Fifth Circuit	1a
Opinion of the United States Court of Appeals for the Eleventh Circuit	21a
Final Order of the United States District Court for the Northern District of Florida	39a
Judgment of the United States District Court for the Northern District of Florida	53a
Unreported Opinion of the United States Court of Appeals for the Eleventh Circuit	55a
Judgment of the United States Court of Appeals for the Eleventh Circuit	61a
Order of the United States Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing	66a

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B

No. 80-5200

DR. ANJALI A. JOSHI,
Plaintiff-Appellant,
v.

FLORIDA STATE UNIVERSITY, *et al.*,
Defendants-Appellees.

June 1, 1981

Appeal from the United States District Court
for the Northern District of Florida

Before TUTTLE, RONEY and VANCE, Circuit Judges.

TUTTLE, Circuit Judge:

Appellant, Dr. Anjali A. Joshi, appeals from dismissal of her employment discrimination suit under Title VII [1] in which she alleged that defendants [2] had discriminated

---

[1] 42 U.S.C. § 2000e *et seq.*

[2] Defendants named in the Complaint were: Florida State University (FSU); Bernard Sliger, in his capacity as President of

against her on the basis of her sex, religion and national origin when they failed to offer her a position as staff physician at the Florida State University Health Center.

I. *Facts*

Appellant is a female physician, born and educated in India. In February 1974, she spoke with Dr. Robert Hunter, then director of the Florida State University Health Center, about employment as a staff physician. Dr. Hunter questioned her regarding her qualifications and gave her information about the operation of the Health Center. He then showed her around the Center and introduced her to several of the physicians employed there.[3] Dr. Joshi did not make a formal application at that time for two reasons: She did not have as yet a license to practice medicine in the United States, and she felt that caring for her two small children would preclude her from taking the required call duty. Dr. Hunter told her she should stay in touch with them.

In August, 1974, Dr. Joshi obtained her Florida medical license and so notified Dr. Hunter. However, Dr. Joshi did not make a formal application for a position as staff physician until August of 1975 when she finally felt she would be able to accept call duty.

During the middle of that month, she was interviewed by Dr. Hunter. According to his usual procedure, he conducted her through the medical center and introduced her to several physicians with whom she had brief inter-

---

FSU; Dr. Homer Ooten, in his capacity as Director of Business Affairs; Dr. Robert Hunter, in his capacity as former Director of FSU Health Center; Dr. Philip Rond, as Director of the FSU Health Center.

[3] Plaintiff testified that she met several physicians working at the Health Center. Dr. Hunter's notes from the interview, which were admitted into evidence, indicate that she saw Drs. Go and Gagliano.

views.[4] Following the tour, Hunter polled the physicians who had met Dr. Joshi. None had any objections to her personality or attitude. To this input from the staff physicians who would be working with Dr. Joshi, Dr. Hunter added his own evaluation of her written application.[5]

Dr. Hunter found Dr. Joshi to be fully qualified for employment as a staff physician, but he needed written authorization from Dr. Homer Ooten, the university administrator with primary fiscal responsibility for the Health Center, before he could fill any position at the Center. On August 18, 1975, he submitted her name, along with the names of five other applicants he had found to be qualified, in a memorandum to Dr. Ooten requesting authorization to hire the six doctors. Dr. Hunter recommended the doctors in the order in which each had made a firm commitment to accept the appointment.[6] Dr. Ooten approved the hiring of the first four on the list. As Dr. Joshi's name was fifth on the list, she was not hired.

---

[4] The physicians who met with an applicant during the tour through the hospital were apparently selected at random, depending upon who was available at the time.

[5] There is no evidence that Dr. Hunter received written recommendations from the physicians who met with Dr. Joshi. She sent a letter dated June 13, 1975, with which she enclosed copies of her medical certificates, her Florida license and references. Dr. Hunter testified that he considered this letter to be her formal application for employment. Outside of his notes on the interview, Dr. Hunter apparently never prepared a written evaluation of the applicant.

[6] The physicians listed in order of priority were: Drs. Donald Treger (white, male); Spurgeon McWilliams (black, male); Yolande Mason (black, female); Eugene Tubbs (white, male); Joshi; and Thomas Dale (white, male). Dr. Hunter testified that Dr. Dale had actually withdrawn his application before this memo was sent to Dr. Ooten.

On August 21, 1975, Dr. Hunter wrote Dr. Joshi to inform her that he had not received approval to hire her.[7] He stated that she was "next on the list and [would] have the first opportunity for the next position that opens." On January 8, 1976, Dr. Hunter sent a memorandum to Dr. Ooten in which he requested authorization to hire Dr. Joshi "at the earliest possible date" since the medical center was understaffed and Dr. Joshi was next in line for employment in terms of qualifications and priority.[8]

Dr. Ooten replied by memorandum dated January 19, 1976. He stated that he was concerned about the small number of physicians on the staff but that he felt that the fact that Dr. Joshi was next in line in terms of the date on which she had made a firm commitment to accept employment was insufficient justification for hiring her.[9] He stated that he did not feel that a commitment had been made to Dr. Joshi despite the implications of Dr. Hunter's letter to her on August 21, 1975. He requested Dr. Hunter to arrange for a select group of staff physicians to interview Dr. Joshi and forward their com-

---

[7] Dr. Hunter did not indicate to Dr. Joshi why approval had been given only for four physicians, but he said simply that those four had priority based on having made commitments to come to work sooner than she had.

[8] Dr. Hunter understood that funds were available for the hiring of a new physician. In a memo to Dr. Ooten dated January 8, 1976, he stated: "At present we have 10 FTE physicians out of an authorized 15. The minimum with which we could do a responsible job is 12. Our budget for the current fiscal year is based on 12 FTE physicians.

[9] Oddly, Ooten had not objected to the "earliest postmark" method of differentiating among the applicants recommended as qualified by Dr. Hunter on August 18 when he said he felt constrained by budgetary reasons to limit his authorization to four of the six applicants listed.

ments regarding her to him by way of a written recommendation.[10]

On January 22, 1976, Dr. Joshi met with this committee. The next day, Dr. McHugh, who had chaired the committee, submitted a written report of the interview to Dr. Ooten. He stated therein that the committee had questioned Dr. Joshi about her past medical experience and reached the conclusion that she appeared well qualified for the position. However, he concluded with the statement that he felt the vacancies should be advertised to determine the availability of physicians prior to hiring any staff physicians. Ooten testified that he called a meeting of the committee members on February 20, 1976, in order to clarify the meaning of this report since it contained no clear recommendation either to hire or not to hire Dr. Joshi. He testified that he learned that some of the physicians had reservations about Dr. Joshi's qualifications.[11] Meanwhile, however, many things were happening at the Health Center.

Dr. Hunter had served as director of the Health Center since April, 1970. On February 11, 1975, he had sent a letter to Stanley Marshall, then President of Florida State University, in which he requested permission to step down from the position of director effective August 31, 1975, or earlier. No action had been taken on the request, and on January 23, 1976, the same day that the physician's committee made the report on Dr. Joshi referred to above, Dr. Hunter wrote to Dr. Ooten asking permission to relinquish the director's position effective January 31, 1976. This time Dr. Hunter's request was

---

[10] The committee members designated by Ooten were Drs. Gagliano, Go, McHugh, Steele and Treger. Dr. Hunter added Dr. Mason to the list and requested Dr. McHugh to chair the committee.

[11] Specifically, Dr. Go testified that she was concerned that Dr. Joshi might not have the expertise in gynecology which was the area in which the Health Center was especially shorthanded.

honored, and Dr. Philip Rond became acting director on or about February 1, 1976. Dr. Hunter testified that he assumed the position of staff physician, apparently the position to which Dr. Joshi aspired, on January 31, 1976.[12]

In early February, 1976, Dr. Joshi telephoned Dr. Hunter to find out what had been the result of her interview. Dr. Hunter told her that he was no longer the director and that she should contact Dr. Ooten. Dr. Joshi testified that she tried to reach Dr. Ooten but that he failed to return her call. Still anxious to learn the results of her interview, she telephoned Dr. Yolande Mason, a black female physician who had been present at the interview, who told Dr. Joshi that she would see what she could find out.[13] Dr. Joshi then telephoned Dr. Ooten's supervisor, Dr. Stephen McClelland, who told her that he would look into the matter. Dr. Joshi testified that shortly thereafter, Dr. Ooten called her and told her there was no vacancy. Dr. Joshi testified that she then phoned Jim Vickery in the Vice Chancellor's office of the Board of Regents who told her he would see what the problem was. Dr. Joshi also contacted Dr. Freddie Groomes, an assistant to the president of FSU with primary responsibility for developing the University's affirmative action programs.[14]

---

[12] Dr. Ooten did not dispute the fact that Dr. Hunter began to serve as a university physician at the end of January, but he was careful to specify that Dr. Hunter was merely in an "acting capacity" as staff physician until the middle of March.

[13] Dr. Mason was unsuccessful in reaching Dr. Ooten on February 6, when she called to find out what the status of Dr. Joshi's application. On February 9, 1976, she received a memo from Dr. Ooten in which he strongly rebuked her for attempting to find out why Dr. Ooten had not returned Dr. Joshi's telephone call.

[14] In an affidavit prepared in response to Dr. Joshi's charge of employment discrimination, Dr. Groomes stated that she contacted Dr. Ooten and Dr. McClelland after her conversation with Dr. Joshi

On February 26, 1976, Dr. Eugent Tubbs, a staff physician at the Health Center, resigned, creating a vacancy. On February 27, Dr. Ooten phoned Dr. Joshi and told her there was a vacancy for which they were going to advertise in the professional journals. That same day, Dr. Ooten wrote Dr. Joshi a letter to inform her that she was being considered for the position of staff physician.[15] From March 11, 1976, through March 20, 1976, a staff physician position was posted as vacant in accordance with state personnel rules.

On March 16, 1976, Dr. Rond sent a memorandum to Dr. McHugh requesting him to re-establish the Physician's Selection Committee[16] to prepare a recommendation for the general physician choice. The committee report dated March 17, 1976, contained three recommendations: First, they recommended that Dr. Hunter be placed in the category of Staff Physician. Secondly, they recommended that Dr. Joshi's application be "tabled until the results of an advertisement have produced, or failed to produce, further applications." Finally, the committee recommended that the Health Center make an effort to employ at least two more full time physicians.

---

and cautioned them to treat Dr. Joshi fairly and to consider only job-related characteristics in determining her qualifications. She also stated that she later received an inquiry from James Vickery who suggested that someone keep Dr. Joshi advised of relevant matters concerning her interest in employment at the Center. She stated that she then phoned Dr. Ooten and reminded him of the need to communicate further with Dr. Joshi.

[15] Dr. Ooten stated that he was required to post the vacancy for two weeks and that he would then receive recommendations from the screening committee and appoint the successful candidate. The trial court found that these proceedings were "probably pretextual" in that Dr. Hunter, a valued longtime employee, was probably assured of the job before any interviewing occurred.

[16] Dr. Rond apparently considered the Physicians Selection Committee to be composed of only Drs. McHugh, Go, Steele and Gagliano. However, the selection committee which actually met was composed of only Drs. McHugh, Steele and Gagliano.

On March 19, 1976, Dr. Ooten wrote to Dr. Joshi to inform her that the position for which she was being considered was to be filled by Dr. Robert Hunter. He stated that her qualifications were impressive but that the committee had "recommended the qualifications of the person selected over those of yourself." [17] On April 2, 1976, Dr. Joshi filed charges of discrimination with the Equal Employment Opportunity Commission.

On April 23, 1976, another staff physician, Dr. Treger, resigned, creating another vacancy at the Health Center. During the spring and summer of 1976, acting director Rond sought applications for physicians at the Health Center. Although he advertised and actively recruited certain physicians,[18] he made no effort to contact Dr. Joshi to notify her of the need for additional physicians at the Center.

On June 11, 1976, the Physicians Screening Committee [19] met to review the curricula vitae on hand of doctors who had written to date about employment in order to choose one for employment in the immediate future. The committee recommended that a position be offered to Dr. Charles Freeble, III, and that interviews be set up with three additional applicants. Dr. Joshi's name was not mentioned. Dr. Freeble turned down the offer on July 19, 1976.

---

[17] The formal committee report signed by Dr. McHugh made no mention of the qualifications of either Dr. Hunter or Dr. Joshi. It just stated: "It was the unanimous opinion of the committee that Dr. Hunter should be placed in the new category as staff physician.

[18] On March 5, Dr. Rond notified Dr. Dale, the individual who had been sixth on the list submitted by Dr. Hunter in August, 1975, that there was a vacancy at the Center for which he could be considered. Dr. Rond also wrote to Dr. Charles Freeble, III, and Dr. William Burk encouraging them to accept offers of employment at the Health Center.

[19] The committee by this time was only Drs. McHugh, Steele and Gagliano.

On July 25, 1976, an advertisement announcing the association of Dr. Joshi with Dr. Edward Clark in the practice of family medicine in Medart, Wakulla County, Florida, appeared in the *Tallahassee Democrat.* Dr. Joshi, however, testified that she never withdrew her application from the university despite this association.

In September of 1976, acting Director Rond hired two new physicians. One, Dr. Latey, was an Indian male, educated in India and certified in surgery by the Royal College of Physicians in Edinburgh, Scotland. The other, Dr. Heller, was a white male who was board certified and had 22 years of experience in the practice of family medicine. A year later, the Health Center employed Dr. Virginia Gillian, a white female who had worked temporarily at the Health Center from March 7, 1977, to June 23, 1977.

On June 14, 1978, Dr. Joshi filed suit in the United States District Court for the Northern District of Florida seeking damages and injunctive relief for the defendants' alleged violation of Title VII. The district court determined that she had made out a prima facie case of employment discrimination but that the defendants had successfully shown legitimate reasons for their failure to hire the plaintiff. The court concluded that the plaintiff had failed to show that the reasons given by defendant were a pretext for discrimination and that the plaintiff had failed to meet the ultimate burden of persuasion by a preponderance of the evidence that she had been discriminated against on the basis of her sex. The court, therefore, entered judgment in favor of defendants, 486 F.Supp. 86.

II. *Stanard of review*

Although discrimination *vel non* is essentially a question of fact, the trial court's finding of nondiscrimination is a resolution of the ultimate issue in this case. We, therefore, are not bound by the clearly erroneous stand-

ard in reviewing that finding, but must make an independent determination of appellant's allegations of discrimination. We are bound, however, by the district court's credibility determinations and findings of subsidiary fact which are not clearly erroneous. *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of the State of Mississippi*, 637 F.2d 1014 (5th Cir. 1981); *East v. Romine*, 518 F.2d 332, 338-39 (5th Cir. 1975); *Causey v. Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975).

III. *Disparate Treatment Allegations*

To establish a prima facie case of employment discrimination, an individual Title VII plaintiff must prove (1) that he or she belongs to a class protected by the statute; (2) that he or she was seeking and was qualified for a job for which the employer was seeking applicants; (3) that, despite the fact that he or she was qualified, the individual was not selected by the employer; and (4) that after such rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the failure to hire the plaintiff." *Texas Department of Community Affairs v. Burdine*, —— U.S. ——, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).[20] The plaintiff must

[20] The nature and extent of the defendant's burden of proof in explaining its actions was the subject of great debate following the *McDonnell Douglas* opinion. *See Sweeney v. Board of Trustees*, 569 F.2d 169, 177 (1st Cir.), *vacated and remanded for reconsideration per curiam*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). *See generally*, Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 *Cornell L.Rev.* 1, 3-11 (1979). This circuit had consistently held that the employer bears the burden of showing a legitimate reason by a preponderance of the evidence. *See Phillips v. Joint Legislative*

then be given an opportunity to prove by a preponderance of the evidence that the proffered justification is merely a pretext for discrimination. *Id.* 101 S.Ct. at 1094-1095. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978). The ultimate burden of persuasion by a preponderance of the evidence rests on the plaintiff. *Jepsen v. Fla. Bd. of Regents*, 610 F.2d 1379, 1382 (5th Cir. 1980).

The trial court found that Dr. Joshi had made out at least the general requirements of a prima facie case under *McDonnell Douglas.*[21] The trial court determined, however, that the defendants had met their burden of showing that the decision not to hire Dr. Joshi was based on legitimate reasons that had nothing to do with her national origin or her sex and that the plaintiff had failed to show that the reasons given were pretextual.

The trial court found that Dr. Joshi's complaint of employment discrimination could be broken down into three separate situations: First, in August, 1975, when her name was fifth on the list of those recommended; secondly, from August, 1975, until January, 1976, when Dr. Hunter continued to press Dr. Ooten for his authorization to hire Dr. Joshi; and third, in March, 1976, when Dr. Hunter had resigned as director and was being interviewed along with the plaintiff for a staff physician position. Finally, the trial court found that the plaintiff was no longer actively in the running for employment at

---

Committee, supra, 637 F.2d at 1027 n. 22; *Burdine v. Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979). The Supreme Court, however, reversing this court in the *Burdine* case held that: "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." 101 S.Ct. at 1096.

[21] The district court noted, however, that there was some question as to the sufficiency of her qualifications for the job. *But see* note 31 *infra.*

the Health Center in September of 1976, when the next hiring of new doctors took place.

With regard to the first instance, the district court found that Dr. Joshi had not been hired because the University was implementing an austerity program, had put a freeze on hiring and had targeted the Health Center as a special budgetary problem. There is sufficient evidence in the record to support the finding that these budgetary constraints were responsible for Dr. Ooten's authorization to hire only the first four doctors on the list of six proposed by Dr. Hunter. We, therefore, affirm the finding of nondiscrimination in this initial failure to hire the plaintiff.

As to the second instance, the district court found that the plaintiff was the victim of continuing budgetary problems as well as a power struggle between Dr. Hunter and Dr. Ooten over the number of staff physicians to be allowed at the Health Center and the manner in which these physicians should be selected. In response to Dr. Joshi's allegation of discriminatory treatment based on the fact that she had had to undergo further interviews after having been approved for hire, the district court found that the formation of the committee was due merely to Dr. Ooten's efforts to accommodate the desire of staff physicians to have more input in the hiring process and the need for screening committees under affirmative action mandates. The trial court found further that the implications from Dr. Hunter's testimony that Dr. Joshi was the only physician he had ever recommended whose recommendation had been rejected were unpersuasive in light of the fact that budgetary constraints were beginning to be felt at just about the time the plaintiff was being considered for employment and that Dr. Hunter's complete control over hiring was unacceptable to several members of the Health Center staff.

Much evidence in the record makes us suspicious of the fact that Dr. Ooten decided to set up a formal screening

committee to interview the plaintiff and review her application after she had already been ranked as qualified equally with five other applicants except in terms of the dates in which each had made a firm commitment to accept employment at the Health Center. For example, Dr. Ooten based his decision to authorize the hiring of the first four from this list solely on the availability of funds and the respective commitment dates of the applicants without questioning this practice. Additionally, Dr. Ooten testified that he was not competent to judge the qualifications of physicians [22] and there is no evidence to support the conclusion that he had been given any reason to question Dr. Joshi's qualifications before he requested that she be interviewed by the screening committee.[23] Moreover, although the pattern of having the "Physicians Selection Committee" meet with applicants continued in form, subsequent applicants apparently saw fewer physicians.[24]

Nevertheless, we refrain from reversing the lower court's finding of nondiscrimination in this second instance. We cannot say that the district court's findings of subsidiary fact are clearly erroneous, and evidence in the record supports the finding that the initiation of the screening process was not necessarily a discriminatory tactic aimed solely at Dr. Joshi. Additionally, there is some question as to whether there were funds available to hire any physicians during this period, as no physi-

---

[22] Dr. Ooten was not a medical doctor. He appears to be a doctor of business administration.

[23] In his January 19, 1976, memo to Dr. Hunter, Dr. Ooten stated merely "It strikes me that I should have input from the fulltime medical staff that will be working with the new physicians."

[24] Dr. Mason was apparently only on the committee on January 23 when it met to interview Dr. Joshi. Dr. Go, the only other woman on the committee, was not present at either the March 17 meeting or the June 11 meeting. *Compare* notes 10, 16 and 18, *supra*.

cians were hired at this time.[25] We conclude, therefore, that the district court did not err by finding that defendants did not act impermissibly in their failure to hire the plaintiff during this period.

With respect to the third instance, designated by the trial court as the point at which the decision was made to employ Dr. Hunter rather than Dr. Joshi, we are troubled by several facts. Defendants presented evidence to show that Dr. Hunter was chosen to fill the vacancy created by Dr. Tubbs who resigned in February, 1976, and that Dr. Hunter knew that he would have to submit to review by a screening committee before being authorized to fill a position as staff physician. However, there is evidence in the record which suggests that authorization of additional funds was not necessary for Dr. Hunter to assume the role of staff physician even if approval by a screening committee was required before he could "step down." In Dr. Hunter's memo to Dr. Ooten dated August 18, 1975, in which Dr. Hunter requested authorization to hire six physicians, the names of Dr. Hunter and Dr. Rond were included with Drs. Ferrell, Gagliano, Go, McHugh, Steele, Jones and Taylor on a list comprising the FTE physicians employed at the Health Center at that time. Thus it appears that, as far as funding was concerned, the administration did not differentiate between the positions of director and staff physician. Moreover, one of the exhibits presented by defendants at trial was a memo dated September 9, 1977, to the University attorney from the administrator of the University Health Center, purporting to list all physicians em-

---

[25] Dr. McHugh's recommendation on January 23 that "the vacancies be advertised . . ." would seem to indicate that there was already a vacancy for which the Center was seeking a physician at the time Dr. Joshi was interviewed, and Dr. Hunter was of the impression that funds were available throughout this period; however, the first vacancy which clearly occurred was in February when Dr. Tubbs resigned.

ployed at the Center since January 1, 1976.[26] Listed are Drs. Latey and Heller who were hired on September 20, 1976, and Dr. Virginia Gillian who was hired during 1977. Curiously absent is the name of Dr. Hunter who was supposedly hired rather than the plaintiff during March, 1976.[27] As a final point, Dr. Hunter testified that he assumed a position as staff physician January 31, 1976, that he did not know he was being considered by a screening committee during March, 1976, and that he did not understand how he had come into competition with Dr. Joshi for the position when he had full qualifications as a specialist in internal medicine, had spent six years as director and had only shifted from "one legislative line to another in the same grade [when there were] *existing position vacancies.*" [Emphasis added.]

It seems quite possible, therefore, that Dr. Joshi could have been hired to fill the vacancy created when Dr. Tubbs resigned without affecting Dr. Hunter's ability to drop into a position of staff physician. We refrain, however, from basing a reversal of the lower court's finding of nondiscrimination on this third instance because the record is not clear with regard to how many staff physicians were being sought at each time in question, and there is evidence in the record which supports the trial court's determination that Drs. Hunter and Joshi were competing for one sole vacancy and that Dr. Hunter was selected because of his long service as Director.

We base our reversal on the district court's erroneous determination that the plaintiff was not discriminated against when Drs. Heller and Latey were hired because

---

[26] Defendants presented this exhibit in an effort to substantiate their claim that they hired large percentages of women and minorities.

[27] Additionally, we find inherently suspect the fact that Dr. Mason, a black female physician who had made some efforts to intervene on behalf of the plaintiff, was told specifically by Dr. Rond not to tell Dr. Joshi that Dr. Tubbs was resigning.

she was no longer actively in the running for employment at the Health Center at that time. There is simply no evidence to support this conclusion.

The district court apparently based its finding that Dr. Joshi was no longer actively in the running for employment on the fact that Dr. Joshi had placed a notice in the *Tallahassee Democrat* advertising her association with another doctor in the practice of family medicine.[28] The fact that this ad appeared in the paper, however, is insufficient to support a finding that the defendants did not consider Dr. Joshi's application because they believed that she was employed elsewhere and, therefore, was no longer interested in employment as a staff physician at the Health Center. Only one defendant, Dr. Rond, testified that he had seen the ad, and he testified on cross-examination that it had no significance for him and that, as far as he knew, she was still interested in employment. Moreover, the ad did not appear in the newspaper until July, 1976, and, therefore, can not even be considered as an explanation for the defendants' failure to consider Dr. Joshi's application at the June 11, 1976, meeting of the physicians screening committee to review the applications then on file.[29]

The evidence overwhelmingly supports the conclusion that Dr. Joshi remained actively in the running for employment at the Health Center during the time period after she was notified that Dr. Hunter had been selected

---

[28] The district court also referred to the fact that the committee which had recommended that Dr. Hunter be hired had also recommended that Dr. Joshi's application be "tabled." However, this report did not indicate that Dr. Joshi's name should be dropped from consideration but merely that her application should be held in abeyance until further advertising had produced, or failed to produce, a wider pool of applicants.

[29] See note 18*supra*.

to fill a position as staff physician. As we stated above, the screening committee recommended that her application be "tabled" not "dropped," and Dr. Joshi testified that she did not withdraw her name. The letter from Dr. Ooten to Dr. Joshi informing her that Dr. Hunter had been selected did not tell her that she would have t resubmit her application to be considered for future vacancies, and Dr. Joshi had already been considered at least twice after having made only one formal application. Moreover, the record contains an affidavit prepared June 3, 1976, by Dr. Groomes in response to the charge of employment discrimination by Dr. Joshi in which Dr. Groomes stated, inter alia, "I have discussed [Dr. Joshi's] interest in employment with appropriate University officials and have reaffirmed with them that her application be considered fairly and that she continue to be advised regarding her status as a candidate for any vacancies which might occur at the University Health Center." Most significant as to this issue is the statement made on the defendant's behalf by their counsel in replying to Dr. Joshi's EEOC charge. This statement is: "At the time she filed this charge (April 8, 1976) she was eligible for consideration for vacancies at the University Health Center. *She would be considered for future vacancies should they occur.*" [Emphasis added.] This statement belies the contention that when Dr. Freeble was offered a position after June 11, 1976, Dr. Joshi was no longer a candidate for the opening. The same is true with respect to the employment of two doctors in September, 1976.

A similar case was recently decided by this Court. In *Phillips v. Joint Legislative Committee*, 5 Cir., 637 F.2d 1014, 1027-28 (1981), we reversed the district court's finding that the defendant's failure to hire a black female applicant was based on a legitimate belief that she was already employed. The trial court had accepted the defendant's explanation that the plaintiff would have been hired had newspaper and television reports not indicated

to them that she was already employed. The court found that the plaintiff failed to show that the reason given was a pretext. In reversing we stated:

> We do not mean to say that Title VII always requires an employer to pursue black applicants even after they are hired elsewhere. We hold only that, on the record in this case, we cannot avoid the conclusion that the reason offered was a convenient way out of an uncomfortable decision—in other words, a pretext.

At 1028. Likewise, we conclude that the fact that Dr. Joshi announced in July, 1976, her association with another doctor fails to constitute a legitimate reason for their refusal to consider Dr. Joshi [30] as an applicant for a position of staff physician.

Thus, contrary to the district court's determination, we find that she was actively in the running for a position as staff physician during the time period following receipt of her last letter from Dr. Ooten. In light of this finding, we conclude that Dr. Joshi made out a prima facie case of employment discrimination in this final instance under the *McDonnell Douglas* standards and that the defendants have as yet failed to show a legitimate reason for their failure to hire her. She is a woman and thus a member of a class protected by Title VII. She had applied, and was qualified [31] for a position for which the

---

[30] One wonders what the trial court would have expected her to do while waiting around for budget conditions (the only bar to her being hired originally) to permit her to be hired. We would not expect her to sit idly by instead of engaging in a medical practice until notified finally of the outcome of her request for employment by the defendants.

[31] The trial court indicated that she might not be qualified for the job; however, there is no foundation for this conclusion. She was initially found to be qualified and recommended by Dr. Hunter by the procedure then practiced at the Health Center. She then, at Dr. Ooten's insistence, interviewed with a group of physicians who

Health Center was actively recruiting applicants. The defendants made offers of employment to at least four male physicians during the period in question and ultimately hired two men to fill positions for which Dr. Joshi was qualified.

Since the trial court found that Dr. Joshi was no longer in the running for employment following Dr. Hunter's being placed in a position as staff physician, the trial court did not reach the question of whether the defendants met their burden under *Burdine* as to this final time period.[32] On remand, the district court must determine whether the defendants produced or are now able to offer evidence of a legitimate, nondiscriminatory reason explaining their failure to hire Dr. Joshi and produced evidence that those ultimately chosen had qualifications equal to those of the plaintiff. *Burdine, supra. See Panlilio v. Dallas Independent School District*, 643 F.2d 315 (5th Cir. 1981). If the trial court determines that the defendants have met or are able to meet this

---

stated that they found her to be "well-qualified for the position." Her qualifications were admittedly considered sufficient to place her in the running against Dr. Hunter and in notifying her that Dr. Hunter had been selected, Dr. Ooten stated "your qualifications were impressive . . ." Additionally, in her affidavit, Dr. Groomes stated "it was determined upon the basis of my conversation with Dr. Ooten that . . . she was not unqualified for any position as a staff physician."

[32] The trial court seems to have been persuaded by defendant's good track record in hiring women and minorities which showed that, during the time period in question, defendants employed greater proportions of women and minorities than were available in the labor market. The district court found that the Health Center, which maintains a staff of approximately 10 doctors, has employed a Filipino woman, a black woman, a white woman, an Indian male and a black male as staff physicians. While such statistical evidence might be relevant to negate an inference of discriminatory motive, it is insufficient to rebut the prima facie case of a specific individual in a disparate treatment case. *See Cross v. United States Postal Service*, 639 F.2d 409 (1981).

burden, the plaintiff must then have an opportunity "to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine, supra,* 101 S.Ct. at 1095.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.[33]

REVERSED and REMANDED.

---

[33] If on remand the district court determines that Dr. Joshi's gender was a factor in the defendant's failure to consider her application but that she would not have been hired in any event because those chosen were thought to be, for any nondiscriminatory reason, better suited for the position. Dr. Joshi would not be entitled to back pay; however, the trial court should consider whether she might be entitled to other relief, if only nominal damages, which would carry with it attorneys fees. *See Gillin v. Federal Paper Board Co., Inc.,* 479 F.2d 97 (2d Cir. 1973); *Saracini v. Missouri Pacific Railroad Co.,* 431 F.Supp. 389 (E.D.Ark.W.D. 1977).

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-3387

DR. ANJALI A. JOSHI,
Plaintiff-Appellant,
v.

FLORIDA STATE UNIVERSITY HEALTH CENTER, BERNARD SLIGER, in his capacity as President of Florida State University, DR. HOMER OOTEN, in his capacity as Director of Business Affairs, DR. ROBERT HUNTER, in his capacity as Former Director of Florida State University Health Center, DR. PHILLIP C. ROND, as Director of Florida State Health Center,
Defendants-Appellees.

June 21, 1985

Rehearing and Rehearing En Banc
Denied Aug. 7, 1985

TUTTLE, Senior Circuit Judge:

Dr. Anjali Joshi appeals from a decision of the district court, 486 F.Supp. 86 (N.D. Fla.1980), holding that Florida State University ("FSU") did not discriminate

against her in its failure to hire her for a position at the FSU Health Center between April and September 1976. We reverse.

A prior appeal in this case was decided by the Fifth Circuit in 1981. *Joshi v. Florida State University*, 646 F.2d 981 (5th Cir., Unit B, 1981), *cert. denied*, 456 U.S. 972, 102 S.Ct. 2233, 72 L.Ed.2d 845 (1982). The Court in this prior appeal ("*Joshi I*") affirmed the district court's finding of no discrimination in three of the instances alleged by Joshi; however, the Court reversed the district court's ruling as to the fourth instance of discrimination holding that the district court had erroneously found that Joshi was no longer in the running for employment during the period from April to September 1976. The Court in *Joshi I* found that Joshi "was actively in the running for a position as staff physician" during this time period and directed that the district court determine on remand "whether the defendants produced or are now able to offer evidence of a legitimate, nondiscriminatory reason explaining their failure to hire Dr. Joshi." *Id.* at 990.

On remand, the district court applied the law of the case to the issue of whether Joshi was an applicant, indicating that the Court "was not free to re-examine the issue of whether or not this plaintiff was an applicant or an active applicant for the positions between the period of April '76 and September of '76. That issue was foreclosed by the opinion of the 5th Circuit Court of Appeals and the opinion of this Court."

The court found, however, that while plaintiff was an active applicant for the position, she was not actively considered because the people at FSU in charge of the hiring process did not in fact believe that she was an applicant. The court further found that "the persons ultimately chosen, that's Doctor Heller and Latti [Latey], had qualifications at least equal to those of the plaintiff"

and that the fact that these doctors were better or equally qualified is the true reason for the employment decision.

Although the only issue on this appeal relates to the fourth alleged instance of discrimination, that relating to the hiring of two male physicians in September 1976, reference to the entire series of contacts between Joshi and the FSU Health Center is essential to an understanding of the factual context in which the instant allegation of discrimination arose. That factual context, largely as stated in *Joshi I*, is as follows: Joshi initially made a formal application for a position as staff physician in August 1975. During the middle of that month, she was interviewed by Dr. Robert Hunter, then director of the Health Center. According to his usual procedure, he conducted her through the medical center and introduced her to several physicians with whom she had brief interviews. Following the tour, Hunter polled the physicians who had met Joshi. None had any objections to her personality or attitude. Hunter found Joshi to be fully qualified for employment as a staff physician, but he needed written authorization from Dr. Homer Ooten, the University administrator with primary fiscal responsibility for the Health Center, before he could fill any position at the Center.

On August 18, 1975, Hunter submitted Joshi's name, along with the names of five other applicants he had found to be qualified, in a memorandum to Ooten requesting authorization to hire the six doctors. Hunter recommended the doctors in the order in which each had made a firm commitment to accept the appointment. Ooten approved the hiring of the first four on the list. As Joshi's name was fifth on the list, she was not hired.

On August 21, 1975, Hunter wrote Joshi to inform her that he had not received approval to hire her. He stated that she was "next on the list and [would] have the first opportunity for the next position that opens." On Jan-

uary 8, 1976, Hunter sent a memorandum to Ooten in which he requested authorization to hire Joshi "at the earliest possible date" since the Medical Center was understaffed and Joshi was next in line for employment in terms of qualifications and priority.

Ooten replied by memorandum dated January 19, 1976. He stated that he was concerned about the small number of physicians on the staff but that he felt that the fact that Joshi was next in line in terms of the date on which she had made a firm commitment to accept employment was insufficient justification for hiring her. He stated that he did not feel that a commitment had been made to Joshi despite the implications of Hunter's letter to her on August 21, 1975. He requested Hunter to arrange for a select group of staff physicians to interview Joshi and forward their comments regarding her to him by way of written recommendation.

On January 22, 1976, Dr. Joshi met with this committee. The next day, Dr. McHugh, who had chaired the committee, submitted a written report of the interview to Ooten. He stated therein that the committee had questioned Joshi about her past medical experience and reached the conclusion that she appeared well qualified for the position. However, he concluded with the statement that he felt the vacancy should be advertised to determine the availability of physicians prior to hiring any staff physicians. Ooten testified that he called a meeting of the committee members on February 20, 1976, in order to clarify the meaning of this report since it contained no clear recommendation either to hire or not to hire Joshi. He testified that he learned that some of the physicians had reservations about Joshi's qualifications.

Hunter stepped down from the position as director of the Health Center effective January 31, 1976. Dr. Phillip Rond became acting director on or about February 1, 1976. Hunter testified that he assumed the position of

staff physician, apparently the position to which Joshi aspired, on January 31, 1976.

In early February 1976, Joshi telephoned Hunter to find out what had been the result of her interview. Hunter told her that he was no longer the director and that she should contact Ooten. Ooten told her that there was no vacancy.

On February 26, 1976, a staff physician at the Health Center resigned, creating a vacancy. On February 27, Ooten phoned Joshi and told her there was a vacancy for which they were going to advertise in the professional journals. That same day, Ooten wrote Joshi a letter to inform her that she was being considered for the position of staff physician. From March 11, 1976, through March 20, 1976, a staff physician position was posted as vacant in accordance with state personnel rules.

On March 17, 1976, a Physician's Selection Committee established by Rond made three recommendations: First, they recommended that Hunter be placed in the category of staff physician. Second, they recommended that Joshi's application be "tabled until the results of an advertisement have produced, or failed to produce, further applications." Finally, the committee recommended that the Health Center make an effort to employ at least two more full-time physicians.

On March 19, 1976, Ooten wrote Joshi to inform her that the position for which she was being considered was to be filled by Hunter. He stated that her qualifications were impressive but that the committee had "recommended the qualifications of the person selected over those of yourself." On April 2, 1976, Joshi filed charges of discrimination with the Equal Employment Opportunity Commission.

On April 23, 1976, another staff physician resigned, creating another vacancy at the Health Center. During the spring and summer of 1976, Rond sought applications

for physicians at the Health Center. Although he advertised and actively recruited certain physicians, he made no effort to contact Joshi to notify her of the need for additional physicians at the Center.

On June 11, 1976, the Physician's Screening Committee met to review the curriculum vitae of doctors who had written about employment in order to choose one for employment in the immediate future. The committee recommended that a position be offered to Dr. Charles Freeble, III, and that interviews be set up with three additional applicants. Joshi's name was not mentioned. Freeble turned down the offer on July 19, 1976.

On July 25, 1976, an advertisement announcing the association of Joshi with another doctor in the practice of family medicine appeared in the Tallahassee Democrat. Joshi, however, testified that she never withdrew her application from the University despite this association.

In September 1976, Rond hired two male physicians for the Health Center, Dr. Latey and Dr. Heller. On June 14, 1978, Joshi filed suit in federal district court seeking damages and injunctive relief for the defendant's alleged violation of Title VII.

I. ISSUES

The issues for decision by this Court are as follows:

1. Did the district court err in its application of law of the case?
2. Is the district court's finding that defendants rebutted plaintiff's prima facie case error?
3. If plaintiff proved discrimination, did defendant meet its burden of proof that plaintiff would not have been hired even in the absence of discrimination?

II. DISCUSSION

A. *Law of the Case*

The district court applied the law of the case doctrine to refuse to re-examine the issue of whether Joshi was an active applicant. The court found, however, that Joshi was not actively considered for hiring because the defendants did not in fact believe that she was an applicant.

> Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case. However, the law of the case doctrine does not apply to bar reconsideration of an issue when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice. Further, while the doctrine encompasses only those issues previously determined, the law is clear that it "comprehends things *decided by necessary implication* as well as those decided explicitly."

Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 (11th Cir.1984) (citations omitted) (emphasis in original).

Joshi contends that the district court correctly applied law of the case to the finding that she was an active applicant and that none of the three exceptions applies. She further contends that law of the case applies to the statements in *Joshi I* that "offers" were made to particular male applicants. *See Joshi I*, 646 F.2d at 985, 985 n. 18, 990.

FSU argues first that law of the case applies only to the specific findings in *Joshi I* and not to "observations, commentary, or mere dicta touching upon issues not for-

mally before the Court." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983). Thus, it contends that the references in *Joshi I* to "offers" were dicta because the only issue was whether plaintiff had made a prima facie case, which includes a showing that defendants continued to seek applicants, not that they made offers. We disagree. The finding that offers were made to four male physicians was an essential component of the *Joshi I* court's holding that Joshi had made out a prima facie case. In *Joshi I*, the Court stated:

> [W]e conclude that Dr. Joshi made out a prima facie case of employment discrimination in this final instance under the *McDonnell Douglas* standards and that the defendants have as yet failed to show a legitimate reason for their failure to hire her. She is a woman and thus a member of a class protected by Title VII. She had applied, and was qualified for a position for which the Health Center was actively recruiting applicants. The defendants made offers of employment to at least four male physicians during the period in question and ultimately hired two men to fill positions for which Dr. Joshi was qualified.

Joshi I, 646 F.2d at 990. As shown by this excerpt from *Joshi I*, the finding that offers were made to four male physicians was used to satisfy the requirement of the *McDonnell Douglas* test that plaintiff prove that the position remained open. Hence it was essential to the court's holding and is binding as law of the case. In addition, the *Joshi I* court found that "Dr. Rond also wrote to Dr. Charles Freeble, III, and Dr. William Burk encouraging them to accept offers of employment at the Health Center." *Id.* at 985 n. 18. This finding is an essential subsidiary finding supporting the finding that offers were made to four male physicians. The four males identified in *Joshi I* as receiving offers are Freeble, Burk, Heller, and Latey. Because this is an essential subsidiary find-

ing supporting the court's holding that Joshi had made out prima facie case, this Court is bound by law of the case to find that offers were made to Drs. Freeble, Burk, Heller, and Latey.

FSU further argues that the only relevant finding in *Joshi I* was that plaintiff had made out a prima facie case by showing that she "was actively in the running for a position." *Joshi I*, 646 F.2d at 990. FSU contends the Court in *Joshi I* specifically expected defendant to be allowed to produce evidence to rebut plaintiff's prima facie case, including her status as an applicant. Thus, defendant contends that law of the case is inapplicable. This argument is without merit. The Court in *Joshi I* specifically held that Dr. Joshi "was actively in the running for a position as staff physician during this period." The district court correctly found that this holding was binding as law of the case and refused to reconsider the question of whether Joshi was an applicant.

FSU next argues that even if law of the case might otherwise apply, two of the exceptions to the doctrine bar its use. First, FSU contends that the second trial produced substantially different evidence. We have reviewed this evidence and find that it is not substantially different evidence but rather evidence previously considered, information obtained by defendants after they decided not to consider plaintiff, or information not in evidence but presented on proffer only.

FSU also contends that a second exception to the law of the case doctrine applies: controlling authority has since made a contrary decision of law applicable to the issue. It points to *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), decided between oral argument and the opinion in *Joshi I*, and to *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), decided subsequent to *Joshi I*. This argument is without merit.

The Court in *Joshi I* considered and applied the Supreme Court's holding in *Burdine*. Although *Pullman-Standard* was decided subsequent to *Joshi I*, FSU has pointed to no disparity between the legal standards discussed in *Pullman-Standard* and those applied in *Joshi I*.

B. *Defendant's Burden of Rebuttal*

The well-known requirement of a defendant-employer once a prima facie case of discrimination has been established is stated by the Supreme Court in *Burdine, supra*. There, the Court said:

> The burden that shifts to the defendant therefore is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the Court that it was actually motivated by the proffered reasons. *See* [*Board of Trustees of Keene State College v.*] *Sweeney, supra* [439 U.S. 24], at 25 [99 S.Ct. 295, 296, 58 L.Ed.2d 216]. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. at 254, 101 S.Ct. at 1094 (footnotes omitted).

Here, the trial court found, without mentioning the term "rebuttal," that "the plaintiff was not actively considered for hiring between the period of April '76 and September '76 because the people at the University in charge of the hiring process did not in fact believe that she was an applicant."

This finding of fact is clearly erroneous for two reasons: (1) Drs. Hunter, Ooten and Rond, as well as the University's Equal Employment Opportunity officer, were intimately engaged in the hiring process so far as it related to Dr. Joshi. Not a single one of these persons other than Dr. Rond testified that he did not consider Dr. Joshi an applicant after April 1. Even Dr. Rond's testimony is far from explicit. His testimony with respect to this matter was as follows:

Q: Dr. Rond, during this period, that is between April and September of 1976, do you know if Dr. Joshi was considered for a position at the Health Center?

A: I would say that she was certainly in the mind of the people in the Health Center. Yes.

Q: Had she been interviewed by the committee?

A: She had been interviewed prior to March of 1976.

Q: Did you in any manner intend to exclude her from any consideration?

A: I didn't intend to exclude her.

Q: Did you think she was an applicant?

A: I didn't think she was an active applicant. No, I had no evidence that she was an active applicant.

Q: Why not?

A: I never had any contact from her of any sort.

Neither Dr. Hunter, who had originally told Dr. Joshi that she was "next on the list and [would] have the first opportunity for the next position that opens,"[1] nor Dr.

[1] Dr. Hunter did not advise her that it would be necessary for her to file an additional application.

Ooten who had written Joshi on February 27 to inform her that there was a vacancy for a staff physician for which she was being considered (without her having made a new application), nor the University Equal Employment Opportunity official testified that he or she did not believe Joshi was an applicant. Thus, even though the court's finding as to the conclusion reached by the defendants might have been sufficient so far as concerns Dr. Rond, there was clearly no evidence from which the trial court could make the finding of fact that "the plaintiff was not actively considered for hiring between the period of April '76 and September '76, because the *people at the University in Charge of the hiring process* did not in fact believe that she was an applicant." (Emphasis added.)

(2) There is another purely objective reason for our holding that, even with respect to Dr. Rond, the evidence was simply overwhelming that all of the named defendants who actively participated in the series of events from the first consideration of Dr. Joshi's application actually knew that she was an applicant at the time of the vacancies.

Whether defendants' erroneous conclusion that Joshi was not an applicant is a legitimate non-discriminatory reason for not considering her depends upon the facts. That is to say, there must be a showing of some factual basis to support the "conclusion of the defendants." The critical facts bearing on this issue as developed at the second trial are as follows:

A. The very persons who the court found "did not in fact believe that she was an applicant," were precisely the same persons whose conduct caused us to conclude in *Joshi I* that Dr. Joshi was a current applicant.

B. Dr. Hunter told Joshi on August 21, 1975, that she was "next on the list and [would] have the first opportunity for the next position that opens" (without telling her she need file a new application).

C. Five months later, on January 8, 1976, Hunter sent a letter to Ooten requesting authorization to hire Joshi "at the earliest possible date" [without her having made a new application].

D. On February 27, 1976, Dr. Ooten telephoned Joshi and wrote her a letter to inform her that there was a vacancy for a staff physician for which she *was being considered* (without her having made a new application).

E. On March 19, she was notified by Ooten that Dr. Hunter, the Director of the Health Center for five years, had been placed in the position she had sought, although her qualifications were "impressive." He ended his letter: "Thank you for your interest in employment at Florida State University."

F. At the March 19th meeting, the Physician's Selection Committee considered the pending application and at that meeting the Committee voted that Dr. Joshi's application be "*tabled* until the results of an advertisement have produced or failed to produce further applications." (Emphasis added.)

G. In an affidavit of June 3, 1976, by Dr. Groomes, the University Equal Employment Opportunity official she stated: "I have discussed [Dr. Joshi's] interest in employment with appropriate University officials and have *reaffirmed* with them that *her* application be considered fairly and that she *continue* to be advised *regarding her status as a candidate* for any vacancies which might occur at the University Health Center." (Emphasis added.)

H. There is no indication in the record that at any time was Dr. Joshi's application "untabled" by any official connected with the hiring process and, of course, she was never notified that her application was not still "on the table."

Finally, the defendants cannot rely upon the fact that Dr. Joshi had placed a notice in the *Tallahassee Demo-*

crat advertising her association with another doctor in the practice of family medicine. As we stated in *Joshi I:*

> The fact that this ad appeared in the paper, however, is insufficient to support a finding that the defendants did not consider Dr. Joshi's application because they believed that she was employed elsewhere and, therefore, was no longer interested in employment as a staff physician at the Health Center. . . . Moreover, the ad did not appear in the newspaper until July, 1976, and, therefore, can not even be considered as an explanation for the defendants' failure to consider Dr. Joshi's application at the June 11, 1976, meeting of the physicians screening committee to review the applications then on file.

Joshi I at 646 F.2d 981, 989.

Thus, we have a situation in which Dr. Joshi herself testified that she had not withdrawn her application, that members of the selection group and other officials of the University had told her that she was to be considered for the next vacancy and also told her that she was actually being considered. As we previously stated in *Joshi I:* "The evidence overwhelming supports the conclusion that Dr. Joshi remained actively in the running for employment at the Health Center during the time period after she was notified that Dr. Hunter had been selected to fill a position as staff physician." 646 F.2d at 989. In light of the above recited facts showing the participation of the University officials in the acts upon which we based that conclusion, it would be sophistry for us to hold that there is any factual support for the defendants' claim that they did not know she was an applicant. All the facts are to the contrary.

We, therefore, conclude that the trial court's finding that the defendants "did not in fact believe that she was an applicant" is clearly erroneous. The defendants have

therefore failed to satisfy the requirements of *Burdine* that they "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection" which "must be legally sufficient to justify a judgment for the defendant." 450 U.S. at 254, 255, 101 S.Ct. at 1094, 1095.

FSU also attempted to rebut Joshi's prima facie case by showing that the males hired or offered the position were at least as qualified as she. This articulated reason is insufficient as a matter of law. The district court found that "the plaintiff was not actively considered for hiring" during this period. This finding is supported by the facts that no one contacted Joshi and that her application was not considered by the screening committee or the director. Because she was not considered, her qualifications were not compared to those of the male applicants and hence, the relative qualifications of those applicants cannot be a reason for the defendants' failure to hire her. In *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 626 (11th Cir. 1983) *cert. denied*, —— U.S. ——, 104 S.Ct. 1415, 79 L.Ed.2d 741 (1984), this Court stated:

> The district court found that even if Eastland established that he was qualified for the position, TVA's hiring decision was justified because the white applicant had superior qualifications. But TVA's selecting supervisor did not know whether the white applicant's qualifications were superior at the time the hiring decision was made. TVA's decision cannot be defended on the basis of the relative qualifications of the applicants if these qualifications were not considered.

Similarly, in this case, because Joshi's qualifications were not considered, FSU cannot rely on its contention that other candidates were better qualified to explain its decision not to hire her.

We conclude, therefore, that neither of the reasons articulated by defendants is sufficient to rebut Joshi's prima facie case. She has thus established that FSU discriminated against her in its failure to select her for a position at the University Health Center.

The district court stated in its oral decision, "there is no evidence before this court and the court finds that her gender was not a factor in her failure to be considered or to have her application considered." This finding is erroneous as a matter of law. Joshi has proven sex discrimination in the method established by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). We held in *Joshi I* that she had established a prima facie case of discrimination. We have here held that defendants' articulated reasons for failing to hire her are legally insufficient. Hence, the prima facie case stands unrebutted, and discrimination is established. *See Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094 (1981). Thus, plaintiff has established that sex was a factor in defendants' decision not to consider her. The presence or absence of direct evidence that sex was a factor is irrelevant.

C. *Defendants' Showing that Plaintiff Would Not Have Been Hired Even in the Absence of Discrimination*

"Once discrimination has been proven, whether by circumstantial or direct evidence, a presumption of entitlement to appropriate remedies such as injunctive and/or declaratory relief, as well as hiring and back pay arises. The burden then shifts to the employer to rebut the presumption by showing that the discriminatee would not have been hired absent the discrimination." *Lewis v. Smith*, 731 F.2d 1535, 1538 (11th Cir.1984) (citations omitted).

The district court found that "the persons ultimately chosen, that's Drs. Heller and Latti [Latey], had qualifications at least equal to those of the plaintiff." The

court's finding that Heller and Latey were at least as qualified as Joshi is not clearly erroneous. This fact, however, is insufficient to meet defendant's burden of showing that Joshi would not have been hired absent the discrimination. In *Joshi I* we found that two other physicians, Burk and Freeble, were also offered the position. This finding is binding on this Court as law of the case. In order to prove that Joshi would not have been hired even in the absence of discrimination, defendants are required to show by a preponderance of the evidence [2] that all those to whom the position was offered, not merely those ultimately employed, were better qualified than Joshi.

The district court made no findings as to the relative qualifications of Joshi and the two offerees. Ordinarily, we would remand to the district court for a finding on this factual question. In the instant case, however, a remand is unnecessary. There is nothing in the record below from which the court could conclude that Burk was better qualified than Joshi. In fact, the Director of the Health Center admitted that he did not have a resumé for Dr. Burk and responded on cross-examination as follows:

---

[2] The standard of proof is described in *Lewis* as follows:

> Since the *Mt. Healthy* [*City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)] decision, which involved constitutionally protected conduct, even though not a violation of Title VII, this court and the Fifth Circuit have required a showing "by a preponderance of the evidence" that the plaintiff would not have been hired absent the discriminatory action. Id. at 287, 97 S.Ct. at 576. *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138 (11th Cir. 1983); *Bell v. Birmingham Linen Service*, 715 F.2d 1552 (11th Cir. 1983); *Lee v. Russell County Bd. of Ed.*, 684 F.2d 769 (11th Cir. 1982); *Ramirez v. Sloss*, 615 F.2d 163 (5th Cir. 1980).

731 F.2d at 1539. *See also, Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362 11th Cir. 1982).

Q: In fact, today you can't tell us what his [Burk's] qualifications were, can you?

A: No. The only thing I recall about him is that he was at a student health center in North Carolina, Chapel Hill, right?

Hence, there is no evidence from which the Court could conclude that all of those to whom the job was offered, including Burk, were better qualified than Joshi. Defendants have thus failed to meet their burden of proving that Joshi would not have been hired in the absence of discrimination.

III. CONCLUSION

Joshi established a prima facie case of discrimination as we previously held in *Joshi I*. The defendants' articulated reasons for failure to hire her failed to rebut that prima facie case. We hold, therefore, that Joshi has established that FSU discriminated against her by failing to hire her as a staff physician. The defendants have not carried their burden of proving that Joshi would not have been hired in the absence of discrimination. Hence, we hold that Joshi is entitled to appropriate relief, including hiring and back pay. We remand for the district court to enter a judgment consistent with this opinion.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. TCA 78-844-MMP

DR. ANJALI A. JOSHI,
Plaintiff,

VS

FLORIDA STATE UNIVERSITY HEALTH CENTER, *et al.*,
Defendants.

FINAL ORDER

This cause is before the Court upon remand from the Eleventh Circuit Court of Appeals. The Eleventh Circuit reversed this Court's judgment for defendants and directed this Court to determine the appropriate relief to be awarded. To that end, the Court conducted a non-jury trial on June 9, 1986. The parties have filed memoranda (doc 165 & 164), and the Court now enters its findings and conclusions.

As a victim of discrimination, plaintiff is entitled to an award of back pay. Both parties have presented evidence of plaintiff's projected earnings had she been employed by defendants since the time of defendants' discrimination. Plaintiff begins her projection of earnings on May 5, 1976, while defendants begin on September 20, 1976, the date on which defendants hired two male physicians to fill positions discriminatorily denied to plaintiff. The Court finds that defendants' liability for back pay should run from July, 1976, because the committee met to review applications in June of 1976 and recommended action on certain of those applications. *Joshi v.*

Florida State University Health Center, 763 F.2d 1227, 1231 (11th Cir. 1985). For 1976 both parties averaged the salaries paid to Latey and Heller. The Court finds that to be an appropriate method and, accordingly, finds that plaintiff would have earned $13,793.75 during the last six months of 1976. For the years from 1977 to 1982, the Court accepts the projected earnings submitted by plaintiff. The parties agree that after 1982 no wages were lost by plaintiff. Consequently, plaintiff's projected earnings at the Florida State University Health Center for the years in question are as follows:

1976	$13,793.75
1977	28,355.35
1978	30,420.07
1979	32,063.70
1980	34,081.07
1981	36,588.28
1982	39,101.27

The parties are in substantial agreement as to plaintiff's actual earnings during the years in question. The figures for 1976 differ because of the different starting dates applied. The Court finds that plaintiff earned $4,240.00 during the final six months of 1976. For the remaining years, the Court finds that plaintiff's figures are accurate. Consequently, plaintiff's interim earnings during the years in question are as follows:

1976	$ 4,240.00
1977	23,305.00
1978	17,808.00
1979	9,379.00
1980	8,888.00
1981	8,308.80
1982	32,955.12

Plaintiff's actual lost wages are determined by substracting her interim earnings from the projected earn-

ings. Those amounts for the years in question are as follows:

1976	$ 9,553.75
1977	5,050.35
1978	12,612.07
1979	22,684.70
1980	25,193.07
1981	28,279.48
1982	6,146.15
TOTAL	$109,519.57

Title 42, United States Code, Section 2000e-5(g) provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons descriminated against shall operate to reduce the back pay otherwise allowable." Accordingly, a prevailing Title VII plaintiff is required to mitigate damages by being reasonably diligent in seeking employment substantially equivalent to the position she was denied. *Smith v. American Service Co. of Atlanta, Inc.*, 796 F.2d 1430, 1431 (11th Cir. 1986) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982)). "The burden of proving lack of diligence is on the defendant once a Title VII plaintiff has established damages resulting from the discriminatory acts of the employer." *Smith*, 796 F.2d at 1431 (citing *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981) (unit A)). Defendants' position is that plaintiff was not reasonably diligent in seeking substantially equivalent employment during the years in question. The several factors which support their position will be addressed individually.

Initially, defendants seek to discount plaintiff's testimony regarding her efforts to seek employment by attacking her credibility as a witness. Several inconsistencies are noted. One, upon which defendants rely heavily, is the inconsistency between her testimony at the remedy hearing on her efforts to secure employment and

her answer to an interrogatory on the same issue prior to the last trial. Defendants' interrogatory and plaintiff's answer were as follows:

> 1. State with particularly giving the date, name and address and phone number of the person or entity contacted and the nature of the contract you have had regarding any job (a) you applied for, (b) inquired about, or (c) expressed serious interest in to someone other that your immediate family, from approximately March, 1974, until the present time. Kindly list your answers separately and chronologically for sections (a), (b) and (c).
>
> (a) Florida State University Health Center, Dr. Robert Hunter; Florida Department of Health and Rehabilitative Services, Tallahassee, Florida; Florida Department of Labor, Office of Disability Determinations; Florida A & M Health Center approximately January 1981 inquiry and interview in November 1981; Dean Shirley. Saw Dr. Brickler on 11/18/80
>
> (b) Same as above.
>
> (c) Same as above.

Aside from the position which is the subject of this lawsuit, therefore, plaintiff listed only three places where she applied for, inquired about, or expressed serious interest in a job. The Office of Disability Determinations is listed as a unit of the Department of Labor. Plaintiff's exhibit at the remedy hearing indicates that it is an office with the Department of Health and Rehabilitative Services (H.R.S.). Despite the fact that plaintiff saw fit to list the Office of Disability Determinations separately from H.R.S., she now contends that her listing of H.R.S. was meant to indicate application to all of the H.R.S. offices, divisions, and sections which she so specifically listed at the remedy hearing. The Court is skeptical of this assertion. Even if true, however, it would not ex-

plain the absence of any reference to the Tallahassee Federal Correctional Institution (F.C.I.), the Leon County Health Department, Planned Parenthood, Capital Medical Plan, the Feminist Women's Health Clinic, and Robin Meyers Company. The Court agrees with defendants that plaintiff's list of applicaitons is less than credible.

Plaintiff testified in 1984 that the Administrator of Wakulla Manor Nursing Home limited her employment to two days per week for Dr. Clark. Moreover, she testified that if she had been offered a full-time position she would have accepted it. The very next witness was Dr. Clark's wife, who testified that although Dr. Clark desperately needed a full-time physician, plaintiff stated that because she had two children in elementary school she could only work two days per week. More directly, Mrs. Clark was asked the following question, and answered "no": "Did the nursing home tell Doctor Clark how many hours that Doctor Joshi could be employed?" Mrs. Clark also disputed plaintiff's testimony that she worked sixteen hours each week for Dr. Clark. Mrs. Clark's testimony was that after a few months plaintiff began to leave early, at 3:00, 3:30, or 3:45. While plaintiff's interest in this litigation is plain, the Court can find no reason to question Mrs. Clark's testimony on these matters.

In light of these discrepancies and plaintiff's interest in this litigation—particularly her obvious interest in this latest proceeding, the Court finds that plaintiff was not a credible witness on the issue of her diligence in seeking alternative employment. This finding applies equally to plaintiff's testimony that there were no days during the relevant period during which she was not either working or seeking employment.

On a more substantive level, defendants offered proof that during the years in question there were substantially equivalent full-time positions available which plaintiff did

not pursue. Dr. Gwartney testified that upon surveying Tallahassee and the surrounding areas he located openings for physicians—openings for which plaintiff did not apply. These jobs were in the emergency rooms of hospitals in Tallahassee and surrounding towns such as Quincy, Bainbridge, and Cairo. He also testified that he located a federally funded position with the Wakulla County Clinic. His testimony was that it required simply a licensed doctor, no experience. He testified specifically on cross examination that he knew of no other qualifications. Significantly, Dr. Gwartney did not contact physicians or clinics to determine if they might have openings. Potentially, those large groups could have had a number of positions available.

In her memorandum, plaintiff attempts to define very narrowly what would be substantially equivalent employment. The Court does not accept that definition. As will be noted below, the full-time jobs which plaintiff claims to have sought, the part-time or contract jogs which she secured, and the job which she had held for the past five years evidence an interest in a particular type of employment. *See infra* p. ——. Those types of jobs, however, are no more similar to the job which plaintiff was denied than the jobs which Dr. Gwartney uncovered. Yet she pursued that type of employment on a part-time, contract, and full-time basis for years. Plaintiff is a licensed professional, a medical doctor; she is not a receptionist, a truck driver, or an x-ray technician, as were the plaintiffs in some of the cited cases. Dr. Gwartney testified that the physician market is a national one. It would be entirely improper to limit the possible mitigating employment as suggested by plaintiff. Applying plaintiff's standard, the type of employment toward which she was inclined would probably not be considered substantially equivalent to the position she was denied. It is this Court's finding, however, that the positions which plaintiff sought and accepted on a part-time and full-time basis, as well as the positions that

Dr. Gwartney found through his survey were all substantially equivalent to the position which plaintiff was denied. Not one of those jobs would have required plaintiff to "go into another line of work, accept a demotion, or take a demeaning position." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982).

Defendants interpret plaintiff's entire employment history to indicate an interest in and the pursuit of part-time employment. While plaintiff disputes this in a somewhat conclusory manner, there is much to support defendants' interpretation. At the remedy hearing, plaintiff presented a chart which displays as time lines the various positions which she held during the relevant period. In light of the other evidence in this case, some conclusions can be drawn from plaintiff's chart.

From the time defendants denied plaintiff employment until she began her current full-time employment, plaintiff operated a private office practice in Tallahassee. The evidence indicates two things about plaintiff's private practice—it neither was regarded as an opportunity for full-time employment, nor did it ever constitute full-time employment. This is demonstrated by the income which it produced, and by plaintiff's efforts, many of which were successful, to arrange other part-time or fee-for-service work. From the time of the discrimination in 1976 until 1982, plaintiff never held a full-time position. She was very adept, however, at securing part-time or fee-for-service arrangements; plaintiff's chart shows that it was not unusual for her to have multiple arrangements of this type at a given time. And yet, the income produced by all these various jobs rarely approached the level expected of a physician.

It is apparent from the evidence that plaintiff's private office practice was not considered a significant *separate* portion of her employment. During November and December of 1977, she had at least three part-time or

fee-for-service arrangements in addition to her office practice. The Court finds it revealing and significant how plaintiff describes her income. In her 1980 testimony, plaintiff classified her income in two ways, self-employment or employment. Only a direct association or employment, such as her arrangement with Dr. Clark, was considered employment. Income from the contract or fee-for-service work was characterized as self-employment income and was all attributed to plaintiff's private practice. This factor makes the income figures from plaintiff's "private office practice" even more striking, and those figures are simply not sufficient to indicate a significant private office practice separate and distinct from the fee-for-service work. The suggestion, therefore, that plaintiff maintained a private office practice while at the same time doing fee-for-service work on a part-time basis for one or more agencies is misleading. The Court finds that this evidence supports defendants' theory that plaintiff, during the years in question, demonstrated a proclivity toward part-time employment—a proclivity which bore directly on her diligence in seeking full-time employment.

As noted previously, the chart plaintiff produced at the remedy hearing also included a list of places where she is said to have applied. Plaintiff's veracity on this and other points has already been addressed. Even assuming, however, that plaintiff applied to all of the places on her list, the Court has the following observations about those places.

Plaintiff begins her list with a notation that she registered each year with the State of Florida, Division of Personnel, Department of Administration. Thereafter, she lists her specific applications chronologically and divided by calendar years. In light of the successful effort to discredit this list, it is safe to regard it as the most positive evidence available as to plaintiff's exercise of reasonable diligence. Nevertheless, this list shows that in

each calendar year prior to Judge Higby's dismissal of plaintiff's case in 1980, she made only two applications. Even aside from any other evidence, that alone could be sufficient to find that plaintiff did not exercise reasonable diligence. It also supports the Court's earlier finding regarding plaintiff's credibility. Plaintiff testified that during these years there were no days when she was not either working or seeking employment. Plaintiff would have this Court believe that during the last six months of 1976 she earned $4,240 and submitted two applications for employment, and this occupied her on a full time basis.

Addressing plaintiff's list more particularly, the Court notes that over half of the specifically listed offices are associated with H.R.S. Two others are F.C.I. and the Leon County Health Department. These places share a characteristic association with some governmental social service agency. Likewise, plaintiff is currently employed by H.R.S.'s Office of Disability Determinations.

From these facts, it might be suspected that plaintiff had some particular interest in employment of that particular type. Further scrutiny confirms those suspicions. Judge Higby's order, which dismissed plaintiff's claims following the first trial, was dated February 22, 1980. Prior to that order, plaintiff's chart lists eight applications, each of which is either H.R.S., F.C.I., or the Leon County Health Department. Those eight applications were made over a period of three and one-half years. About fifteen months passed between Judge Higby's order and the Fifth Circuit's reversal in June of 1981. During this short period during which her claims were denied and dismissed, however, plaintiff also made eight applications. In addition to the increased frequency of application, the list evidences a much greater diversity, including two private clinics, a health maintenance organization, a corporation, and the Florida A & M University Student Health Service.

Plaintiff's chart, therefore, demonstrates that after her claims were dismissed she stepped up her efforts to find employment and no longer limited her inquiries to a certain type of employer. It is apparent, therefore, that plaintiff's efforts prior to Judge Higby's order were less than diligent and in good faith.

The Court would also note that those part-time or fee-for-service jobs which plaintiff did secure also support the Court's finding that she was inclined toward a specific type of employment. Her most lengthy association was with the Leon County Health Department. Her next most lengthy association was with F.C.I. Although she worked for Dr. Clark, plaintiff testified that that association came about after she contacted the Wakulla Manor Nursing Home seeking employment. The other two jobs on the chart lasted less than four months. Consequently, plaintiff's history of part-time employment confirms the interest disclosed by her list of applications.

Finally, while the Court may not properly ground its decision on this evidence, defendants' expert testimony addressing plaintiff's interim earnings figures also supports the Court's findings. Plaintiff is correct that her efforts in mitigation should be evaluated on an individual basis, without reference to the efforts of any other individual or groups. *See United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 938 (10th Cir. 1979). Neverless, Dr. Gwartney's testimony confirms the Court's conclusion that plaintiff did not exercise reasonable diligence to mitigate her damages.

On the basis of the foregoing discussion, the Court concludes that defendants have met their burden of proving plaintiff's lack of diligence. Defendants have shown that plaintiff's assertions of diligence are not credible. Defendants have proved that there were substantially equivalent jobs available for which plaintiff did not apply. Defendants have proved that plaintiff had a proclivity

toward part-time employment, as well as a proclivity toward a specific type of employment, and that plaintiff's efforts to secure full-time employment were limited thereby. Plaintiff did not satisfy her obligation to mitigate damages.

Having found that plaintiff did not mitigate her damages, the Court must determine the amounts which plaintiff could have earned through reasonable diligence. Although, as noted earlier, an averaging approach is not favored in the determination of whether a plaintiff has exercised reasonable diligence, once a plaintiff has been found to have failed to exercise due diligence, it is not improper to use averages to determine interim earnings. *See Lee Way Motor Freight*, 625 F.2d at 938.[1] Accordingly, the Court will rely on Dr. Gwartney's testimony to determine "amounts earnable with reasonable diligence."

Dr. Gwartney testified at the remedy hearing that the median income for beginning level physicians nationally from 1974-1978 was $32,000—$37,500. His survey of area opportunities disclosed salaries in the upper part of that range. Dr. Gwartney testified that he would expect anyone diligently seeking full-time employment to find such work at or near the market rate within six to nine months. This opinion was based on the negligible unemployment rate among physicians.

The two physicians from which both plaintiff and defendants calculated plaintiff's projected earnings had an

---

[1] *Lee Way Motor Freight* involved multiple claimants; it was those claimants to whom the "average man" or "best man" approaches were sought to be applied. The instant case involves no such group of claimants, but rather statistical averages or ranges from the class to which plaintiff belongs. The parties apparently have not found this distinction significant. The Court agrees that the reasoning expressed in *Lee Way Motor Freight* is equally applicable to the instant situation.

average salary of $27,587.50 for their first year. As the Court has previously determined, it was not until 1979 that plaintiff's projected earnings reached $32,000, the low end of Dr. Gwartney's median range. Obviously, physicians at defendants' health center were being paid at rates lower than both the national median and the area market as indicated by Dr. Gwartney's survey. Under these circumstances, the Court can only conclude that if plaintiff had exercised reasonable diligence she would have found employment within a reasonable time, and any such employment would have resulted in earnings at least equal to her projected earnings at the Florida State University Health Center. This conclusion is supported by plaintiff's actual interim earnings of almost $33,000 in 1982—the first year of the first full-time employment she has had since completing her residence.

The Court is aware that even if plaintiff had exercised reasonable diligence, it could have taken a few months for her to secure employment. Dr. Gwartney testified that six to nine months would have been sufficient. The Court will go further, however, and find that within one year plaintiff would have found substantially equivalent employment. Accordingly, plaintiff shall recover her actual lost earnings for the first year. That amount would be $9,553.75 for the last six months of 1976 and $2,525.18 for the first six months of 1977, for a total of $12,078.93.

Plaintiff is also entitled to an award of pre-judgment interest on the above amount. At the remedy hearing, plaintiff's expert presented calculations of interest based on the prevailing long-term treasury rate and on a rate of 12%. Defendants' expert, on the other hand, based any interest calculations on the six-month treasury bill interest rate. The Court finds that the appropriate interest rate is 12%, to be compounded annually. Plaintiff is entitled, therefore, to an award of pre-judgment interest

in the amount of $26,936.93.[2] Plaintiff shall also recover post-judgment interest at a rate of 5.75% from the date of this order.

Plainti ffindicated at the remedy hearing that it is still her desire to serve as a university physician at Florida State. As noted before, she has been employed for a number of years at H.R.S.'s Office of Disability Determinations. Furthermore, the Court has previously found that this is the type of employment toward which she was inclined. Defendants presented, at the remedy hearing, the testimony of Dr. Kent, Director of Student Health Services at Florida State, regarding defendants' current and short term hiring needs. The Court has given the fullest consideration to the current status of both plaintiff and defendants. The Court finds that plaintiff is entitled to a hiring preference for the next full-time university physician vacancy.

Although her complaint included a prayer for an award of attorneys' fees, plaintiff did not address that point at the remedy hearing. If plaintiff deems it appropriate, in light of the findings and conclusions expressed herein, the Court will allow plaintiff fifteen (15) days from the date of this order to file a motion for an award of attorneys' fees.

In accordance with the findings of fact and conclusions of law contained herein, this Court will enter a judgment in favor of plaintiff Anjoli A. Joshi upon receipt of the form of judgment which is to be prepared by plaintiff and submitted to this Court pursuant to Rule 58, Federal Rules of Civil Procedure. The Court will allow plaintiff fifteen (15) days to file the form of judgment.

---

[2] The Court applied the interest rate to each year ending June 30. The total interest figure, therefore, includes ten full years and four months.

DONE AND ORDERED this 6th day of November, 1986.

/s/ Maurice M. Paul
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. TCA 78-844-MMP

DR. ANJALI A. JOSHI,

Plaintiff,

VS.

FLORIDA STATE UNIVERSITY HEALTH CENTER; BERNARD SLIGER, in his capacity as President of Florida State University; DR. HOMER OOTEN, in his capacity as Director of Business Affairs; DR. ROBERT HUNTER, in his capacity as Former Director of Florida State University Health Center; and DR. PHILIP C. ROND, as Director of Florida State Health Center,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Maurice M. Paul, District Judge, presiding and the issues having been duly heard and a decision (entitled Final Order and dated November 6, 1986) having been duly rendered,

IT IS ORDERED AND ADJUDGED:

1. That the Plaintiff, ANJALI A. JOSHI recover of the Defendants, FLORIDA STATE UNIVERSITY HEALTH CENTER, et al, the sum of TWELVE THOUSAND SEVENTY-EIGHT DOLLARS AND NINETY-THREE CENTS ($12,078.93) plus prejudg-

ment interest in the amount of TWENTY-SIX THOUSAND NINE HUNDRED THIRTY-SIX DOLLARS AND NINETY-THREE CENTS ($26,936.93), for a total award to Plaintiff of THIRTY-NINE THOUSAND FIFTEEN DOLLARS AND EIGHTY-SIX CENTS ($39,015.86), bearing post judgment interest at the rate of 5.75 percent per annum, and her costs of the action.

2. Defendants shall also offer to Plaintiff the position of full-time University physician at the time of the next vacancy for that position.

DATED at Tallahassee, Florida, this 10th day of December, 1986.

/s/ Maurice M. Paul
Clerk of the Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3119

D.C. Docket No. 78-0844

DR. ANJALI A. JOSHI,
Plaintiff-Appellant,

versus

FLORIDA STATE UNIVERSITY, FLORIDA STATE UNIVERSITY HEALTH CENTER, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(April 18, 1988)

Before HATCHETT and EDMONDSON, Circuit Judges, and MARKEY*, Chief Circuit Judge.

PER CURIAM:

Dr. Anjali A. Joshi (Joshi) challenges as inadequate a judgment of the U.S. District Court for the Northern District of Florida awarding her $12,078.93 in back pay,

---

* Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

with pre- and post-judgment interest, and ordering Florida State University Health Center (FSU) to offer to her the position of full-time University physician when and if the next vacancy occurs in that position.

BACKGROUND

Dr. Joshi sued FSU in 1978, alleging that FSU's failure to offer her a position as a staff physician was the result of unlawful discrimination. 486 F. Supp. 86 (N.D. Fla. 1980). The Fifth Circuit reversed in part the district court's dismissal of Joshi's complaint. 646 F.2d 981 (5th Cir., Unit B, 1981), *cert. denied*, 456 U.S. 972 (1982). On remand, the district court found no discrimination. The Eleventh Circuit reversed and directed the district court to award appropriate relief. 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

Following a bench trial, the district court determined that Joshi had lost earnings of $109,517.57 from July 1976, the date of the discrimination, through 1982. The district court found, however, that Joshi had not mitigated damages by being reasonably diligent in seeking substantially equivalent employment. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982); 42 U.S.C. § 2000e-5(g). Having found that reasonable diligence would have resulted within a year in a job with earnings at least equal to Joshi's projected earnings at FSU, the district court awarded her only those earnings lost from July 1976 through June 1977, or $12,078.93.

The court found that Joshi was entitled to the next available full-time FSU physician position, but did not mention seniority or benefits in its order. Following the entry of judgment, Joshi filed a motion under Fed. R. Civ. P. 59(e) requesting, *inter alia*, that the judgment be amended to show Joshi's entitlement to retroactive seniority, retirement credits and contributions, sick leave, annual leave, and other fringe benefits. The district court denied the motion. Joshi filed a timely notice of

appeal on February 17, 1987. Fed. R. App. P. 4(a)(1), (4).

OPINION

I. *Mitigation of Damages*

FSU had the burden to show that Joshi failed to exercise reasonable diligence toward mitigation of damages under 42 U.S.C. § 2000e-5(g). *Smith v. American Serv. Co. of Atlanta*, 796 F.2d 1430, 1431 (11th Cir. 1986); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 623 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). That burden included showing that: (1) there were positions available substantially equivalent to the one Joshi was discriminatorily denied, and (2) Joshi failed to use reasonable diligence in seeking such positions. *Rasimas*, 714 F.2d at 624.

A. *Substantially Equivalent Positions*

Joshi says the district court erred in defining too broadly the positions that would be substantially equivalent to the one Joshi was denied. [The district court properly rejected Joshi's definition as too narrow.] As the court noted, none of the physician jobs FSU identified would have required Joshi to go into another line of work, accept a demotion, or take a demeaning position. *Ford Motor Co.*, 458 U.S. at 231-32 & n.16; *see Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir. 1975).

Joshi says that because FSU failed to determine the specific requirements and working conditions of the jobs it identified, FSU's evidence was insufficient to show that substantially equivalent positions were available. However, those alleged evidentiary deficiencies depend entirely on Joshi's narrow and properly rejected definition of a "substantially equivalent" position.

B. *Reasonable Diligence*

Joshi says the district court's finding that she was not reasonably diligent in mitigating damages was based on legal error because the court "focused not on [Joshi's] efforts to mitigate, but on her relative level of success." The district court's opinion shows the contrary. In finding that Dr. Joshi was not reasonably diligent in mitigating damages, the district court specifically relied on wide-ranging evidence in the record, not simply on Joshi's low earnings.

The district court found that Dr. Joshi "was not a credible witness on the issue of her diligence in seeking alternative employment. This finding applies equally to [Joshi's] testimony that there were no days during the relevant period during which she was not either working or seeking employment." Joshi's assertion that the district court "appeared to ignore or overlook the fact that Dr. Joshi was working full-time" ignores that credibility finding, and relies only on her own discredited testimony. Joshi has shown no basis for overturning the court's credibility finding. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

C. *Conclusion*

Joshi has not shown clear error in the district court's finding that Joshi "did not satisfy her obligation to mitigate damages." Fed. R. Civ. P. 52(a).

II. *Rule 59 Motion*

On February 2, 1987, the district court entered an order denying Joshi's Rule 59 motion, without explaining whether that denial was based on untimeliness or on the merits.

A. *Timeliness*

FSU aserts that we lack jurisdiction to review the district court's denial of Joshi's Rule 59(e) motion be-

cause that motion, filed on December 29, 1986, 17 days after the entry of judgment, was untimely. We conclude that we have jurisdiction.

The district court entered judgment on Wednesday, December 10, 1986. Rule 59(e) provides:

> A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Accord Allen v. Ault, 564 F.2d 1198, 1199 (5th Cir. 1977) (service date, not filing date, determines timeliness under Fed. R. Civ. P. 59(b)). Because December 20, 1986, the tenth day after entry of judgment, was a Saturday, Joshi's Rule 59(e) motion was timely if served on or before Monday, December 22, 1986. *Lusted v. San Antonio Indep. School Dist.*, 741 F.2d 817, 819 (5th Cir. 1984) (if the last day of a period allowed by the Federal Rules falls on a weekend or holiday, the period runs until the next business day); Fed. R. Civ. P. 6(a) (same).

"The date of service of a motion to amend the judgment within the meaning of Rule 59(e) is the date upon which the moving party certified, without contest by the non-moving parties, that the motion was mailed to opposing counsel." *Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 746 F.2d 278, 289 (5th Cir. 1984), *cert. denied*, 107 S. Ct. 398 (1986); *see* Fed. R. Civ. P. 5(b) ("Service by mail is complete upon mailing."). The Certificate of Service accompanying Joshi's Rule 59(e) motion stated that the motion was served on opposing counsel by mail on December 22, 1986. Noting to the district court that the motion was postmarked December 23, 1986, FSU questioned whether it was timely. FSU presented no evidence to show that it was not mailed on December 22 as certified, however. Absent such evidence in the record, we have no basis on which to conclude that the motion was not timely served. *See Eulo v. Deval Aerodynamics,*

Inc., 47 F.R.D. 35, 41 (E.D. Pa. 1969) ("[i]n the absence of opposing affidavits filed by defense counsel this Court must conclude that service properly was made on April 15, 1968"), *modified*, 430 F.2d 325 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

B. *Merits*

This court reviews the denial of a Rule 59(e) motion only for an abuse of discretion. *Thomas v. Farmville Mfg. Co.*, 705 F.2d 1307, 1307 (11th Cir. 1983) (per curiam). We conclude there is none here.

Although, as Joshi notes, the district court had the power to grant Joshi a preferential hiring right with retroactive seniority and other benefits, *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764-66 (1976), Title VII does not require courts to grant such relief. *Id.* at 770; 42 U.S.C. § 2000e-5(g). Under the facts of this case, where the district court made a [not clearly erroneous finding] that Joshi failed to use reasonable diligence to mitigate damages, we cannot conclude that the district court abused its discretion in not amending the judgment to reflect entitlement to the requested benefits. *See Ford Motor Co.*, 458 at 230-31.

AFFIRMED.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

June 28, 1988

Miguel J. Cortez
Clerk

Marvin S. Waits, Clerk
United States District Court
Northern District of Florida
110 East Park Avenue
Room 122
Tallahassee, Florida 32301

No. 87-3119
Dr. Anjali A. Joshi v. Florida State University, et al.
D.C. No. TCA 78-0844

(×) Enclosed is a certified copy of the judgment of this court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 36-1 Decision in the above case issued as and for the mandate.

Motion for stay of mandate having been denied in the above case, enclosed is a certified copy of the judgment of this court issued as and for the mandate.

( ) The Supreme Court having denied certiorari in the above case, enclosed is a certified copy of the judgment of this court issued as and for the mandate.

( ) We have received notice that the Supreme Court has denied certiorari in the above case. This court's

judgment as mandate having already issued, no further order will be forthcoming.

Also enclosed are the following:

(×) Copy of this court's opinion
( ) Bill of Costs
( ) Original Exhibits
( ) Original record on appeal or review, consisting of:

WILL BE RETURNED AT A LATER DATE.

Sincerely,

MIGUEL J. CORTEZ
Clerk

By: /s/ Joyce Tuggle
Deputy Clerk

Encl.

cc: Jerry Traynham
Elizabeth Southard
Gene T. Sellers
Linda Carr Schmidt

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3119

D.C. Docket No. 78-0844

DR. ANJALI A. JOSHI,
Plaintiff-Appellant,

versus

FLORIDA STATE UNIVERSITY,
FLORIDA STATE UNIVERSITY HEALTH CENTER, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

Before HATCHETT and EDMONDSON, Circuit Judges, and MARKEY *, Chief Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that the plaintiff-appellant shall pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 18, 1988

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ [Illegible]
Deputy Clerk

Issued as Mandate: June 28, 1988

---

* Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

June 20, 1988

Miguel J. Cortez
Clerk

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 87-3119
Dr. Anjali A. Joshi v. Florida State University, et al.
D.C. No. TCA 78-0844

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely

MIGUEL J. CORTEZ
Clerk

By: /s/ Joyce Tuggle
Deputy Clerk

Encl.

Jerry Traynham
Elizabeth Southard
Gene E. Sellers
Linda Carr Schmidt

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3119

DR. ANJALI A. JOSHI,
Plaintiff-Appellant,

versus

FLORIDA STATE UNIVERSITY,
FLORIDA STATE UNIVERSITY HEALTH CENTER, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING
(June 20, 1988)

BEFORE: HATCHETT and EDMONDSON, Circuit Judges, and MARKEL *, Chief Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Dr. Anjali A. Joshi, is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

---

* Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

* * * *

11th Cir. R. 41-1 *Stay or Recall of Mandate.*

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion of rehearing in banc vacates the panel opinion and stays the mandate.

* * * *

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

CASE NO. 88-654

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DR. ANJALI JOSHI,

Petitioner,

v.

FLORIDA STATE UNIVERSITY HEALTH CENTER, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

GERALD B. JASKI, General Counsel
Counsel of Record
LINDA C. SCHMIDT,
Associate General Counsel
FLORIDA STATE UNIVERSITY
311 Hecht House
Tallahassee, Florida 32306
(904) 644-4440

24pp

CASE NO. 88-654

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DR. ANJALI JOSHI,

Petitioner,

v.

FLORIDA STATE UNIVERSITY HEALTH CENTER, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

GERALD B. JASKI, General Counsel
Counsel of Record
LINDA C. SCHMIDT,
Associate General Counsel
FLORIDA STATE UNIVERSITY
311 Hecht House
Tallahassee, Florida 32306
(904) 644-4440

QUESTIONS PRESENTED

I. WHETHER THE ELEVENTH CIRCUIT COURT'S CONSTRUCTION OF THE CONCEPTS OF "SUBSTANTIALLY EQUIVALENT" EMPLOYMENT AND "REASONABLE DILIGENCE" IN MITIGATING DAMAGES, AS SET FORTH IN FORD MOTOR CO. v. E.E.O.C., 458 U.S. 219 (1982), CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

II. WHETHER IT IS WITHIN THE DISCRETION OF A COURT TO DECLINE TO AWARD VARIOUS RETROACTIVE BENEFITS TO A TITLE VII PLAINTIFF WHO HAS FAILED TO MITIGATE DAMAGES.

LIST OF PARTIES

The parties to this proceeding are Dr. Anjali A. Joshi, Petitioner; and Dr. Bernard F. Sliger, in his capacity as President of Florida State University, Dr. Bobby E. Leach in his capacity as former Vice President for Student Affairs, Dr. Robert B. Kimmel, in his capacity as Acting Director, Florida State University Health Center, Dr. Homer Ooten in his capacity as former Director of Business Affairs, Dr. Robert Hunter, in his capacity as former Director of the Florida State University Health Center, and Dr. Philip Rond, in his capacity as former Director of the Florida State University Health Center.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Statement of the Case and Facts	1
Summary of the Argument	6
Argument	8
I. THE ELEVENTH CIRCUIT COURT'S CONSTRUCTION OF THE CONCEPTS OF "SUBSTANTIALLY EQUIVALENT" EMPLOYMENT AND "REASONABLE DILIGENCE" IN MITIGATING DAMAGES AS SET FORTH IN FORD MOTOR CO. v. E.E.O.C., 458 U.S. 219 (1982), DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.	
II. THE ELEVENTH CIRCUIT COURT'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF DISCRETION IN THIS CAUSE IN DECLINING TO GRANT PETITIONER RETROACTIVE BENEFITS, WHERE PETITIONER FAILED TO MITIGATE HER DAMAGES, DOES NOT CONSTITUTE AN ABUSE OF DISCRETION NOR DOES IT CONFLICT WITH THIS COURT'S PRIOR DECISIONS.	13
Conclusion	16
Certificate of Service	17
Appendix	1a

TABLE OF AUTHORITIES

	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).	13
Anderson v. City of Bessemer City, 470 U.S. 564 (1985).	12
Ellis v. Ringgold School Dist., 832 F.2d 27 (3rd Cir. 1987).	15
Florence Printing Co. v. NLRB, 376 F.2d 216 (4th Cir. 1967).	9
Ford Motor Co. v. E.E.O.C., 458 U.S. 219 (1982).	8, 10, 11
Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).	13
Hegler v. Bd. of Education of Bearden School Dist., 447 F.2d 1078 (8th Cir. 1971).	10
Joshi v. Florida State University, et al., No. TCA 78-844-MMP (N.D. Fla. Nov. 6, 1986)	4, 5
NLRB v. Madison Courier, Inc., 472 F.2d 1307 (D. C. Cir. 1972).	9
Spagnuolo v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983).	9

STATEMENT OF THE CASE AND FACTS

Respondent will attempt to correct inaccuracies from the statements in Petitioner's brief.

The use of the word "other" in the following quotation may imply that lack of Petitioner's credibility was not one of the bases for the Court's rejecting Petitioner's private medical practice as a reasonable effort to mitigate damages:

> Judge Paul rejected Petitioner's private medical practice as a reasonable effort to mitigate her damages, and found her testimony concerning her other efforts was not credible.

Petitioner's brief at 3-4 (emphasis supplied). Respondent disputes any implication that lack of Petitioner's credibility was not involved in the Court's rejection of her private medical practice as a reasonable effort to

mitigate. Judge Paul found that Dr. Joshi was not a credible witness.

Regarding available substantially equivalent employment, the district court found that there were substantially equivalent full-time positions available, identified by Dr. Gwartney, that Petitioner did not pursue. Petitioner now claims that she was not qualified for the four identified emergency room positions, but the record and the findings of fact do not support this assertion. Regarding her claim that the Wakulla County clinic required residence within that county, the trial court specifically found that there were no other qualifications beyond being a licensed doctor. The Eleventh Circuit Court of Appeals affirmed the district court in rejecting Petitioner's definition of substantially equivalent employment as too narrow.

The trial court also noted that there was the additional potential of other positions available at physicians' offices and clinics that Dr. Gwartney did not check.

Regarding the assertion that Petitioner informed the University in August 1975 "that she was . . . willing to accept night and weekend duty" (Petitioner's Brief at 5), Respondent excepts.

Respondent also disputes the following statement on page 6 of Petitioner's brief: "Because her practice did not grow quickly enough to occupy her on full time basis, she supplemented her private practice by doing both part-time work and "fee-for-service" work. . . ." The alleged cause and effect relationship suggested by the first clause is contrary

to what the district court found about Petitioner's private practice: "[I]t neither was regarded as an opportunity for full-time employment, nor. . . ." Joshi v. Fla. State Univ., No. TCA 78-844 MMP, slip op. at 8, (N.D. Fla. Nov. 6, 1986)(Petitioner's Appendix at 45a). Respondent further disputes use of the conjunction "and" in the second clause to suggest that Petitioner simultaneously worked in private practice and did additional [unspecified as to nature] part-time work and "fee-for-service" work. The trial court found that the disjunctive "or" was the appropriate word to interpose between "part-time" and "fee-for-service." The trial court found that Petitioner's "private office practice was not considered a significant separate portion of her employment." Joshi, slip op. at 9,

Petitioner's Appendix at 45a (emphasis in original).

Further, Respondent vigorously objects to the statement in Petitioner's brief at 6 that "Between her private office practice and the other work she performed, Petitioner engaged in the practice of medicine on a full time basis. . . . (emphasis removed).

Here, as in the instances cited previously, Petitioner is making assertions contrary to the fact findings of the trial court based on Petitioner's discredited testimony. The same is true regarding Petitioner's list of places where she applied for work. See Joshi, slip op. at 4-6, Petitioner's Appendix at 42a-43a.

Petitioner simply was not a credible witness on the issue of mitigation of damages.

SUMMARY OF THE ARGUMENT

It is only by misstating the holding of the Eleventh Circuit that Petitioner can argue that the court's construction of the concepts of "substantially equivalent" employment and "reasonable diligence" in mitigating damages conflicts with decisions of other circuits. The court's actual holding, based in large part on Petitioner's lack of credibility, creates no conflict.

The Eleventh Circuit's affirmance of the District Court's award of a hiring preference, but not seniority, does not conflict with the cited cases because Petitioner was not comparable to the plaintiffs in the cited cases. Neither the award of a hiring preference, which was granted, nor an award of seniority,

which was not granted, was required; both are matters within the trial court's discretion.

ARGUMENT

I. The Eleventh Circuit Court's construction of the concepts of "substantially equivalent" employment and "reasonable diligence" in mitigating damages, as set forth in Ford Motor Co. v. E.E.O.C., 458 U.S. 219 (1982), does not conflict with decisions of other circuits.

Petitioner mischaracterizes the Eleventh Circuit as being "unconcerned with whether the Petitioner would have to obtain licensure in another state, additional and perhaps extended training, or dislodge her husband from his employment and move her family to another geographic area" (footnotes omitted). Petitioner's brief at 10. These mischaracterizations apparently are based upon alleged requirements for the specifically identified positions, additionally alluded to in footnotes 9-11

of Petitioner's brief. These alleged requirements were not presented by the Plaintiff nor found to exist by the trial court and are not part of the record in this case. Petitioner's whole conflict argument rests on the above stated mischaracterization of the Eleventh Circuit's holding.

Under Petitioner's erroneous premise, the Eleventh Circuit would go against: Florence Printing Co. v. NLRB, 376 F.2d 216 (4th Cir. 1967), by disallowing refusal of employment that "is dangerous, distasteful or essentially different from that for which [she] sought employment"; NLRB v. Madison Courier Inc., 472 F.2d 1307 (D. C. Cir. 1972), by disallowing rejection of "a position located over fifty miles from her place of residence"; Spagnuolo v. Whirlpool Corp., 717 F.2d

114 (4th Cir. 1983), by "requiring a discrimination victim to accept employment at an unreasonable distance. . . ."; and Hegler v. Board of Education of Bearden School District, 447 F.2d 1078 (8th Cir. 1971), by requiring a claimant to leave her community and move to another state. As can readily be seen from reading the transcript in this cause, the Eleventh Circuit's affirmance of the District Court made no such unreasonable demands of Petitioner. There is no conflict between the Eleventh Circuit's unpublished decision and those of the Fourth, Eighth, and D. C. Circuits. Rather, the Eleventh Circuit Court of Appeals applied this Court's standard in Ford, requiring

> reasonable diligence in finding other suitable employment. Although the unemployed or

> underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied.

458 U.S. at 231-232. The Court found that the petitioner in this cause refused substantially equivalent employment, and the court created no conflict with any other circuit courts in so finding.

Moreover, the court's finding that Petitioner did not exercise reasonable diligence involved Petitioner's credibility, an issue on which the trial court's findings are entitled to very great deference:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands <u>even greater deference</u> to the trial court's findings; for only the trial

> judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.
>
> . . .
>
> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses [and therefore disbelieve at least one other witness], . . . that finding, if not internally inconsistent, can virtually never be clear error.

Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985)(emphasis supplied).

II. The Eleventh Circuit Court's affirmance of the District Court's exercise of discretion in this cause in declining to grant Petitioner retroactive benefits, where Petitioner failed to mitigate her damages, does not constitute an abuse of discretion nor does it conflict with this Court's prior decisions.

Petitioner's brief correctly cites the settled federal law set forth in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), regarding the usual make-whole relief granted successful Title VII plaintiffs. However, the case at bar does not conflict with those cases because Petitioner is not the ordinary Title VII plaintiff. The University proved at trial that Petitioner did not want a job requiring full-time work at the time the University did not hire her and for several years thereafter.

Petitioner testified that she is now making as much money where she is working at the Office of Disability Determinations, where she has been since 1982, as she would have been making had she been hired at the University Health Center (R10-59) (Appendix 1a). There is nothing in the record to support any implication that Petitioner has not accrued the kind of other benefits at her present employment that she wants from the University. The period of her present employment is the only time Petitioner was entitled to such benefits because she worked full time to accrue them. Surely she was not entitled to accrue benefits during the period she was not entitled to salary. Petitioner wants to be treated as if she mitigated damages, which she did not. Under the circumstances the trial court

did not abuse its discretion in declining to grant Petitioner retroactive seniority, and the Eleventh Circuit created no conflict by affirming the trial court. In fact, the Third Circuit has held that an award of reinstatement following a failure to mitigate is not required and, even if given, it does not require an award of seniority as well. See Ellis v. Ringgold School Dist., 832 F.2d 27 (3rd Cir. 1987).

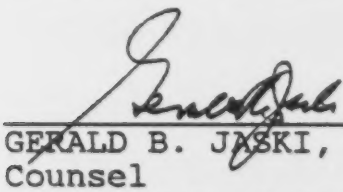
These matters are discretionary.

The Petition for Writ of Certiorari has identified no conflict between the decision below and any decision(s) of this Court or of any other circuit courts of appeals. It should be denied for that reason. Moreover, a just result was reached in this case.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied. In the event that the Court decides to grant certiorari, however, Respondent respectfully requests the opportunity for a full briefing on the merits of this cause.

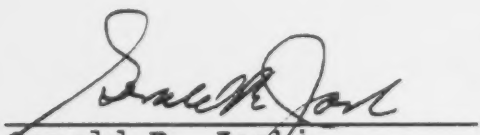
Respectfully submitted,



GERALD B. JASKI, General Counsel
Counsel of Record
LINDA C. SCHMIDT
Associate General Counsel
FLORIDA STATE UNIVERSITY
311 Hecht House
Tallahassee, Florida
(904) 644-4440

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jerry G. Traynham, Esquire, Patterson and Traynham, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32315, Attorney for Petitioner, by U. S. Mail this 16th day of December, 1988.



Gerald B. Jaski
Counsel of Record

APPENDIX

Q Now your salary in working at Disability Determinations since you went full time in February of 1982 is actually more than you would have earned at the health center if you had been hired when Doctors Heller and Latey were hired, correct?

A If I was hired as the senior physician in the health department it may have been the same. Both jobs are senior physician.

Q My question was whether your salary working at Disability Determinations was greater than it would have been from 1982, February 12, if you had been hired at the health center?

A No, it would have been the same.

Q So it wouldn't have been any less or more, it would have been the same?

A Yes.